

~~1390~~ United States

1384

# Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,  
and SOUTHERN PACIFIC COMPANY, a Corporation,  
Plaintiffs in Error,

vs.

A. LEVY and J. ZENTNER COMPANY, a Corporation,  
Defendant in Error,

and

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,  
and SOUTHERN PACIFIC COMPANY, a Corporation,  
Plaintiffs in Error,

vs.

A. W. KNOX,

Defendant in Error,

and

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,  
and SOUTHERN PACIFIC COMPANY, a Corporation,  
Plaintiffs in Error,

vs.

JOSEPH MOYSE and A. P. JACOBS, Copartners Doing Business,  
Under the Firm Name and Style of JACOBS, MALCOLM  
& BURTT,

Defendants in Error.

## Transcript of Record.

Upon Writs of Error to the Southern Division of  
the United States District Court of the  
Northern District of California,  
Second Division.



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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amendment to Answer (No. 16694).....	128
Amendment to Answer (No. 16741).....	19
Amendment to Answer (No. 16746).....	212
Answer of Defendants, Northern Pacific Rail- way Company and Southern Pacific Com- pany (No. 16694) .....	119
Answer of Defendants Northern Pacific Rail- way Company and Southern Pacific Com- pany (No. 16741) .....	13
Answer of Defendants, Northern Pacific Rail- way Company and Southern Pacific Com- pany (No. 16746).....	202
Assignment of Errors (No. 16694) .....	163
Assignment of Errors (No. 16741).....	102
Assignment of Errors (No. 16746).....	246
Bill of Exceptions (Nos. 16741, 16746, 16694)..	55
Certificate of Clerk U. S. District Court to Transcript of Record (Nos. 16746, 16694, 16741) .....	253
Citation on Writ of Error (No. 16694).....	261

Index	Page
Citation on Writ of Error (No. 16741) . . . . .	257
Citation on Writ of Error (No. 16746) . . . . .	265
Complaint (No. 16694) . . . . .	109
Complaint (No. 16741) . . . . .	1
Complaint (No. 16746) . . . . .	170
Decision (Nos. 16746, 16741, 16694, 16693) . . . .	26

**EXHIBITS:**

Exhibit "A" Attached to Amendment to Answer (No. 1694)—Fourth Section Order No. 3700 . . . . .	131
Exhibit "A" Attached to Amendment to Answer (No. 16741)—Fourth Section Order No. 3700 . . . . .	21
Exhibit "A" Attached to Amendment to Answer (No. 16746) — Fourth Section Order No. 3700 . . . . .	214
Exhibit "A" Attached to Findings of Fact and Conclusions of Law (No. 16694)— Order of Interstate Commerce Com- mission . . . . .	145
Exhibit "A" Attached to Findings of Fact and Conclusions of Law (No. 16741)— Order of Interstate Commerce Com- mission . . . . .	38
Exhibit "A" Attached to Findings of Fact and Conclusions of Law (No. 16746)— Order of Interstate Commerce Com- mission . . . . .	228

EXHIBITS—Continued:

- Exhibit "B" Attached to Findings of Fact and Conclusions of Law (No. 16694)—Application for Relief from Provisions of Fourth Section of Amended Commerce Act for Account of Pacific Freight Tariff Bureau Joint and Proportional Freight Tariff No. 1, I. C. C. No. 2 of F. W. Gomph, Agent . . . . . 151
- Exhibit "B" Attached to Findings of Fact and Conclusions of Law (No. 16741)—Application for Relief from Provisions of Fourth Section of Amended Commerce Act for Account of Pacific Freight Tariff Bureau Joint and Proportional Freight Tariff No. 1, I. C. C. No. 2 of F. W. Gomph, Agent . . . . . 44
- Exhibit "B" Attached to Findings of Fact and Conclusions of Law (No. 16746)—Application for Relief from Provisions of Fourth Section of Amended Commerce Act for Account of Pacific Freight Tariff Bureau Joint and Proportional Freight Tariff No. 1, I. C. C. No. 2 of F. W. Gomph, Agent . . . . . 234
- Exhibit "C" Attached to Findings of Fact and Conclusions of Law (No. 16694)—Application for Relief from Provisions of Fourth Section of Amended

Index	Page
EXHIBITS—Continued:	
Commerce Act for Account of Pacific Freight Tariff Bureau and Proportional Freight Tariff No. 1-A, I. C. C. No. 62 of F. W. Gomph, Agent.....	154
Exhibit "C" Attached to Findings of Fact and Conclusions of Law (No. 16741)—Application for Relief from Provisions of Fourth Section of Amended Commerce Act for Account of Pacific Freight Tariff Bureau and Proportional Freight Tariff No. 1-A, I. C. C. No. 62 of F. W. Gomph, Agent.....	47
Exhibit "C" Attached to Findings of Fact and Conclusions of Law (No. 16746)—Application for Relief from Provisions of Fourth Section of Amended Commerce Act for Account of Pacific Freight Tariff Bureau and Proportional Freight Tariff No. 1-A, I. C. C. No. 62 of F. W. Gomph, Agent.....	237
Exhibit "D" Attached to Finding of Fact and Conclusions of Law (No. 16694)—Application for Relief from Provisions of Fourth Section of Amended Commerce Act for Account of Tariff No. 1-A, I. C. C. No. 62 of F. W. Gomph, Agent .....	156

EXHIBITS—Continued:

Exhibit "D" Attached to Finding of Fact and Conclusions of Law (No. 16741)—Application for Relief from Provisions of Fourth Section of Amended Commerce Act for Account of Tariff No. 1-A, I. C. C. No. 62 of F. W. Gomph, Agent .....	49
Exhibit "D" Attached to Finding of Fact and Conclusions of Law (No. 16746)—Application for Relief from Provisions of Fourth Section of Amended Commerce Act for Account of Tariff No. 1-A, I. C. C. No. 62 of F. W. Gomph, Agent .....	239
Findings of Fact and Conclusions of Law (No. 16694) .....	137
Findings of Fact and Conclusions of Law (No. 16741) .....	31
Findings of Fact and Conclusions of Law (No. 16746) .....	220
Judgment on Findings (No. 16694).....	157
Judgment on Findings (No. 16741) .....	50
Judgment on Findings (No. 16746) .....	240
Minutes of Court — March 14, 1923 — Order Allowing Defendant to File an Amendment to Answer (No. 16694) .....	128
Minutes of Court — March 14, 1923 — Order	

Index	Page
Allowing Defendant to File an Amendment to Answer (No. 16741) .....	19
Minutes of Court—March 14, 1923—Order Allowing Defendant to File an Amendment to Answer (No. 16746) .....	211
Minutes of Court—June 18, 1923—Order for Judgment (No. 16694) .....	136
Minutes of Court—June 18, 1923—Order for Judgment (No. 16741) .....	31
Minutes of Court—June 18, 1923—Order for Judgment (No. 16746) .....	219
Names and Addresses of Attorneys of Record..	1
Order Allowing Defendant to File an Amendment to Answer (No. 16694) .....	128
Order Allowing Defendant to File an Amendment to Answer (No. 16741).....	19
Order Allowing Defendant to File an Amendment to Answer (No. 16746).....	211
Order Allowing Writ of Error (No. 16694)....	167
Order Allowing Writ of Error (No. 16741)....	106
Order Allowing Writ of Error (No. 16746)....	250
Order for Judgment (No. 16694) .....	136
Order for Judgment (No. 16741).....	31
Order for Judgment (No. 16746) .....	219
Order Settling Foregoing Bill of Exceptions (Nos. 16741, 16746, 16694).....	100
Petition for Writ of Error (No. 16694).....	162
Petition for Writ of Error (No. 16741).....	101
Petition for Writ of Error (No. 16746).....	244



Index	Page
Praeipe for Transcript of Record (No. 16694) .....	169
Praeipe for Transcript of Record (No. 16741)	107
Praeipe for Transcript of Record (No. 16746) .....	251
Return to Writ of Error (No. 16694).....	260
Return to Writ of Error (No. 16741).....	256
Return to Writ of Error (No. 16746).....	264
Stipulation and Order Extending Time to and Including September 27, 1923, to File Bill of Exceptions (No. 16694).....	158
Stipulation and Order Extending Time to and Including September 27, 1923, to File Bill of Exceptions (No. 16741) .....	52
Stipulation and Order Extending Time to and Including September 27, 1923, to File Bill of Exceptions (No. 16746) .....	241
Stipulation and Order Extending Time to and Including October 15, 1923, to File Bill of Exceptions (No. 16694) .....	159
Stipulation and Order Extending Time to and Including October 15, 1923, to File Bill of Exceptions (No. 16741) .....	53
Stipulation and Order Extending Time to and Including October 15, 1923, to File Bill of Exceptions (No. 16746) .....	242
Stipulation and Order Extending Time to and Including October 25, 1923, to File Bill of Exceptions (No. 16694).....	160

Index	Page
Stipulation and Order Extending Time to and Including October 25, 1923, to File Bill of Exceptions (No. 16741) .....	54
Stipulation and Order Extending Time to and Including October 25, 1923, to File Bill of Exceptions (No. 16746) .....	243
Stipulation and Order Extending Time to and Including November 10, 1923, to File Bill of Exceptions (No. 16694) .....	161
Stipulation and Order Extending Time to and Including November 10, 1923, to File Bill of Exceptions (No. 16741).....	54
Stipulation and Order Extending Time to and Including November 10, 1923, to File Bill of Exceptions (No. 16746).....	244
Stipulation and Order Extending Time to and Including November 20, 1923, to File Bill of Exceptions (Nos. 16694, 16741, 16746)..	161
Stipulation and Order for Preparation of Single Bill of Exceptions (Nos. 16741, 16746, 16694) .....	51
Stipulation and Order Re Printing Transcript.	269
Stipulation and Order Relative to Consolidation of Records and Briefs .....	267
Stipulation and Order Waiving Bonds on Allowance of Writ of Error (No. 16694) ....	168
Stipulation and Order Waiving Bonds on Allowance of Writ of Error (No. 16741)....	107



Index	Page
Stipulation and Order Waiving Bonds on Allowance of Writ of Error (No. 16746) . . . . .	251
Stipulation Re Settlement, etc., of Bill of Exceptions (Nos. 16741, 16746, 16694) . . . . .	100
<b>TESTIMONY ON BEHALF OF PLAINTIFFS:</b>	
HARWOOD, A. J. . . . .	59
Cross-examination . . . . .	60
KNOX, A. W. (In Rebuttal) . . . . .	88
Cross-examination . . . . .	89
Recalled . . . . .	93
<b>TESTIMONY ON BEHALF OF DEFENDANTS:</b>	
CUMMINGS, M. A. . . . .	80
GOMPH, F. W. . . . .	72
Trial Stipulation (No. 16694) . . . . .	126
Trial Stipulation (No. 16741) . . . . .	18
Trial Stipulation (No. 16746) . . . . .	210
Writ of Error (No. 16694) . . . . .	258
Writ of Error (No. 16741) . . . . .	254
Writ of Error (No. 16746) . . . . .	262



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Francisco, California,  
Attorney for Defendants in Error.

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In the Southern Division of the District Court of  
the United States, Northern District of Cali-  
fornia, Second Division.

AT LAW.—No. 16741.

A. LEVY & J. ZENTNER COMPANY, a Corpora-  
tion,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a  
Corporation, and SOUTHERN PACIFIC  
COMPANY, a Corporation,

Defendants.

**Complaint.**

Now comes A. Levy & J. Zentner Company, a  
corporation, a resident of the city and county of  
San Francisco, State of California, in the Southern  
Division of the Northern District of California, and  
complains of the defendants, Northern Pacific Rail-

2 *Northern Pacific Railway Company et al.*

way Company, a corporation, and Southern Pacific Company, a corporation, and for cause of action allege:

I.

That at all times herein mentioned plaintiff was, and now is, a resident of the city and county of San Francisco in the Northern District of California. That at all times herein mentioned plaintiff was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That the defendant Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Minnesota; that the defendant Southern Pacific Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that at all times herein mentioned each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one state or territory of the United States to other states and [1\*] territories thereof; that each of said defendants is, and at all times herein mentioned was, subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," as amended.

III.

That said defendant Northern Pacific Railway

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\*Page-number appearing at foot of page of original certified Transcript of Record.

Company operates and at all times herein mentioned operated a railroad from the station of Kennewick, in the State of Washington, to the city of Portland, in the State of Oregon. That said defendant Southern Pacific Company operates and at all times herein mentioned operated a railroad from said city of Portland to San Francisco, Modesto, Stockton, San Jose, Porterville and Merced in the State of California (hereinafter called said points of delivery). That said railroad, from the said station of Kennewick to the said city of Portland, passes through the stations of Harrah, Wapato, Topenish, Sunnyside and Outlook, which said stations are hereinafter called said intermediate stations. That all of said intermediate stations are in the State of Washington.

#### IV.

That prior to the year 1917, said defendants established a through route and joint rate on potatoes from said station of Kennewick to said points of delivery, which said through route and joint rate so established by defendants was in effect during and at the times that all the shipments described in paragraph V of this complaint moved. That said through route from said station of Kennewick to said points of delivery passes through said intermediate stations. That said railroad and said joint route from said station of Kennewick to said points of delivery passes through said intermediate stations. That it is a less distance from said intermediate stations and each of them, to said points of delivery than it is from said station of Kenne-

wick to said points of delivery. That it is a longer distance from said station of Kennewick over the same line and route in the same direction to said points of delivery than [2] it is from said intermediate stations to said points of delivery, the shorter being included within the longer distance.

V.

That between the 26th day of October, 1921, and the 11th day of March, 1922, viz., on the dates hereinafter stated in this paragraph of this complaint, said plaintiff caused to be shipped and transported over the said line of the defendants, Northern Pacific Railway Company and Southern Pacific Company, from said intermediate stations to said points of delivery, sixty-eight carloads of potatoes; that said sixty-eight carloads of potatoes were all transported from said intermediate stations to the said points of delivery.

That upon the arrival of said shipments at said points of delivery, the defendants demanded that plaintiff pay for the transportation thereof charges in excess of the charges then made by defendants for the transportation of the same quantity and of like kind of property for a longer distance over the same line in the same direction, the shorter being included within the longer distance; that is to say, the defendants demanded that plaintiff pay for the transportation of said potatoes charges greater than said defendants then charged for the transportation of potatoes from the said station of Kennewick to the said point of delivery. That plaintiff thereupon paid said charges so demanded by defendants,



which said charges so paid by plaintiff were greater than the compensation then charged by defendants for the transportation of like kind of property for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

That the following statement shows the date of shipment of each carload, the number of the car in which it was shipped, the station from which the shipment was made, the place of destination of each shipment, the amount of the charges paid by said plaintiff for the transportation thereof, the date that said charges were paid, and the amount by which the charges so paid exceeded the charges then made for the [3] transportation of the same quantity of like kind of property for the greater distance, as aforesaid, which said last mentioned amount appears under the head "Overcharge" in the following statement: [4]

6 *Northern Pacific Railway Company et al.*

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
10/29/21	IC 68852	Harrah	San Francisco	\$264.95	11/ 8/21	\$79.09
10/29/21	LV 35944	Harrah	San Francisco	259.22	11/ 8/21	77.38
11/14/21	Erie 61092	Harrah	San Francisco	247.63	11/25/21	73.92
11/16/21	OGW 30409	Harrah	San Francisco	248.74	12/ 5/21	74.26
11/17/21	NP 95388	Harrah	San Francisco	248.03	12/ 9/21	75.04
11/25/21	CNW 16416	Wapato	San Francisco	230.07	12/ 8/21	54.24
11/26/21	NP 97204	Wapato	San Francisco	221.94	12/12/21	52.34
11/29/21	RI 67736	Wapato	San Francisco	232.30	12/12/21	54.77
12/ 2/21	CBQ 37786	Wapato	San Francisco	221.92	12/19/21	52.32
12/ 6/21	PRR 101900	Wapato	San Francisco	229.01	12/19/21	59.41
12/ 7/21	Erie 61293	Wapato	San Francisco	226.24	12/21/21	53.34
12/ 8/21	NYC 141382	Wapato	San Francisco	229.61	12/21/21	54.14
12/10/21	SLSF 1187	Wapato	San Francisco	225.93	12/25/21	53.28
12/12/21	Penn 102094	Wapato	San Francisco	222.41	12/28/21	52.44
12/14/21	NP 95516	Wapato	San Francisco	245.37	1/ 3/22	57.86



Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
1/11/22	NP 95595	Wapato	San Francisco	211.95	1/25/22	49.65
1/12/22	Penn 102871	Wapato	San Francisco	212.18	1/25/22	49.70
1/13/22	NP 96895	Wapato	San Francisco	216.65	1/25/22	50.75
2/14/22	L&N 56438	Toppenish	San Francisco	200.97	3/ 3/22	47.08
2/15/22	NP 94569	Toppenish	San Francisco	210.96	2/28/22	49.42
2/16/22	NP 95212	Toppenish	San Francisco	223.36	3/ 1/22	52.32
1/10/22	NP 95148	Sunnyside	San Francisco	205.57	1/23/22	48.15
1/21/22	Penn 103126	Sunnyside	San Francisco	203.07	2/ 2/22	47.37
1/21/22	SFRD 6567	Sunnyside	San Francisco	201.74	2/ 2/22	47.25
1/21/22	SSW 50491	Sunnyside	San Francisco	227.27	2/ 2/22	53.23
1/28/22	NP 97554	Sunnyside	San Francisco	229.38	2/10/22	53.73
2/14/22	NP 95779	Sunnyside	San Francisco	207.96	2/28/22	48.71
2/15/22	IC 58142	Sunnyside	San Francisco	222.33	3/ 3/22	52.07
2/17/22	NP 96000	Sunnyside	San Francisco	230.05	3/ 6/22	53.89
2/16/22	NP 95525	Sunnyside	San Francisco	201.63	3/ 1/22	47.23

Co Northern Pacific Railway Company et al.

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
2/17/22	NP 94658	Sunnyside	San Francisco	217.06	2/28/22	50.84
2/18/22	NP 95705	Sunnyside	San Francisco	218.39	3/ 6/22	51.15
2/21/22	NYC 152361	Sunnyside	San Francisco	205.41	3/10/22	48.12
2/23/22	NP 95763	Sunnyside	San Francisco	206.13	3/10/22	48.28
2/24/22	NP 98865	Sunnyside	San Francisco	199.73	3/16/22	46.73
2/24/22	NP 95811	Sunnyside	San Francisco	202.91	3/13/22	47.53
2/25/22	NP 94824	Sunnyside	San Francisco	233.32	3/23/22	54.65
2/25/22	NP 97304	Sunnyside	San Francisco	220.22	3/13/22	52.58
2/25/22	NP 96768	Sunnyside	San Francisco	202.41	3/16/22	48.43
2/28/22	NP 94451	Sunnyside	San Francisco	202.80	3/15/22	47.50
2/28/22	NP 96877	Sunnyside	San Francisco	205.13	3/15/22	48.05
3/ 1/22	NP 94649	Sunnyside	San Francisco	221.78	3/17/22	51.95
3/11/22	NP 96608	Outlook	San Francisco	216.14	3/23/22	50.62
3/10/22	NP 96508	Outlook	San Francisco	219.31	3/23/22	51.37
3/ 2/22	NP 96394	Outlook	San Francisco	217.25	3/23/22	50.48

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
2/28/22	NP 98431	Outlook	San Francisco	249.89	3/15/22	58.53
2/28/22	SFRD 15233	Outlook	San Francisco	259.57	3/17/22	60.84
2/27/22	NP 94846	Outlook	San Francisco	220.22	3/15/22	51.58
2/28/22	NP 95323	Outlook	San Francisco	229.08	3/15/08	53.66
2/26/22	NP 95272	Outlook	San Francisco	258.49	3/15/22	60.55
2/25/22	NP 94977	Outlook	San Francisco	216.81	3/18/22	50.78
2/23/22	NP 94671	Outlook	San Francisco	228.02	3/10/22	53.41
2/23/22	SLSW 50349	Outlook	San Francisco	229.13	3/10/22	53.37
2/19/22	NP 98110	Outlook	San Francisco	212.43	3/ 6/22	49.76
2/15/22	SFRD 14934	Outlook	San Francisco	243.34	3/ 3/22	57.00
1/11/22	IC 54019	Outlook	San Francisco	218.86	1/25/22	51.26
1/16/22	NP 96745	Outlook	San Francisco	227.74	2/ 2/22	53.34
1/28/22	NP 95853	Outlook	San Francisco	223.67	2/10/22	52.39
[5]						
1/29/22	NP 96693	Outlook	San Francisco	223.91	2/10/22	52.45

10 *Northern Pacific Railway Company et al.*

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
1/25/22	NP 95682	Outlook	San Francisco	215.65	2/ 8/22	50.52
1/25/22	NYC 141382	Outlook	San Francisco	208.46	2/10/22	48.83
1/26/22	NP 95949	Sunnyside	Stockton	223.89	2/ 4/22	52.45
11/23/21	CBQ 38439	Wapato	Modesto	310.51	12/ 8/21	51.27
2/11/22	NP 95520	Outlook	Modesto	223.04	3/30/22	68.15
11/25/21	NP 98024	Toppenish	San Jose	233.20	12/14/21	54.99
1/14/22	NP 94605	Sunnyside	San Jose	200.74	2/ 2/22	47.02
11/15/21	NP 97201	Toppenish	Porterville	288.32	11/30/21	4.82
10/27/21	NYC 139456	Toppenish	Merced	273.16	11/13/21	47.46

That the first figure in the column headed "Date of shipment" and in the column headed "Date of Payment" shows the month of the year and the second figure the day of the month and the third figure the year of the present century; that the figures in the columns headed "Charges paid" and "overcharged" represent dollars and cents, the figures before the decimal point representing dollars and the figures after the decimal point representing cents.

## VI.

That neither of said defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery than from said intermediate stations to said points of delivery. That a lower rate or compensation for the haul from said station of Kennewick to said points of delivery did not exist on the 18th day of June, 1910, the time of the passage of the Act of Congress of June 18, 1910, amendatory to said Act of Congress of February 4, 1887. That the Interstate Commerce Commission never authorized said defendants, or either of them, to charge less from Kennewick to said points of delivery than from said intermediate stations to said points of delivery.

## VII.

That neither of said defendants has paid the plaintiff the amount of said overcharges, or any part thereof, or any interest thereon.

VIII.

That the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of \$3,000, and is between citizens of different states, to wit, between the plaintiff a citizen of the State of California and the defendants who are citizens [6] of states other than California, as hereinabove alleged.

WHEREFORE plaintiff prays judgment against said defendants for the amount of said overcharges, as alleged in paragraph V, to wit, for the sum of Three Thousand Six Hundred and Seven and 06/100 Dollars (3607.06), together with interest on each overcharge at the rate of seven per cent per annum from the date of payment thereof, and for the further sum of \$1000 as attorney's or counsel's fees. And the plaintiff also prays judgment for its costs of suit.

ALFRED J. HARWOOD,  
Attorney for Plaintiff.

State of California,  
City and County of San Francisco,  
Northern District of California,—ss.

Sidney Levy, being first duly sworn, deposes and says: That he is an officer, to wit, the secretary of the plaintiff corporation above named; that he has read the within and foregoing complaint and knows the contents thereof and the same is true of his own knowledge.

SIDNEY LEVY.



Subscribed and sworn to this 17th day of June, 1922.

[Seal] E. M. CLARK,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Jun. 17, 1922. W. B. Mal-  
ling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[7]

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(Title of Court and Cause—No. 16741.)

**Answer of Defendants Northern Pacific Railway  
Company and Southern Pacific Company.**

Now come the defendants Northern Pacific Rail-  
way Company and Southern Pacific Company, and,  
for answer to the complaint herein, admit, aver  
and deny as follows, to wit:

I.

Aver that they have not sufficient knowledge,  
information or belief upon the subject to enable  
them to answer the allegations of paragraph I of  
said complaint, and, upon that ground, deny each  
and every, all and singular, the allegations in said  
paragraph contained.

II.

Deny that the railroad of the defendant North-  
ern Pacific Railway Company from the station of  
Kennewick to the city of Portland passes through  
the station of Harrah, and deny that said station  
is an intermediate point on said line between  
Kennewick and Portland or between Kennewick

and any of the points of destination mentioned in said complaint.

III.

Deny that said or any through route from said station of Kennewick to said points of delivery, or any of them, passes through said station of Harrah, or that the same is an intermediate point upon said line or route, or that said railroad or said joint route from said station of Kennewick to said points of delivery, or any of them, passes through said station of Harrah.

IV.

Admit, subject to verification, that the plaintiff and its assignor made the shipment of potatoes between the points described in paragraph V of said complaint and paid freight charges thereon, as alleged in said paragraph.

V.

Deny that neither of defendants ever applied to the [8] Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery, or any of them, than from said intermediate stations, or any of them, to said points of delivery, or any of them.

SECOND SEPARATE DEFENSE.

And for a further and separate answer and defense to said complaint, defendants aver that the station of Harrah is not situated upon the line of defendant Northern Pacific Railway Company passing between the city of Kennewick, in the State of Washington, and the city of Portland, in the State of Oregon, but said station is situated



upon a branch line of defendant Northern Pacific Railway Company, and that said station is not intermediate upon said line of railway of Northern Pacific Railway Company passing between said city of Kennewick and said city of Portland, or between said city of Kennewick and any of the points of destination mentioned in the complaint.

### THIRD SEPARATE DEFENSE.

And for a further, separate and third answer and defense to said complaint, defendants aver that on or about the 11th day of February, 1911, these defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington. That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, intermediate to said California points herein named, and said station of Pasco. That said application has never been cancelled or withdrawn and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission. [9]

#### FOURTH SEPARATE DEFENSE.

For a further, separate and fourth answer and defense to said complaint, defendants aver that the plaintiff did not prior to the commencement of this action, nor at all, apply to the Interstate Commerce Commission for reparation for or on account of the matters and things alleged in said complaint, nor has said commission ever made an order directing either of the defendants to pay to the plaintiff any sum whatsoever for or on account of the assessment or collection of freight charges upon any of the shipments alleged in the complaint.

#### FIFTH SEPARATE DEFENSE.

And for a further, separate and fifth answer and defense to said complaint, defendants aver, upon information and belief, that the plaintiff has not been damaged by the payment of any of the freight charges mentioned in the complaint.

#### SIXTH SEPARATE DEFENSE.

And for a further, separate and sixth defense and answer to said complaint, defendants aver that between the 26th day of October, 1921, and the 11th day of March, 1922, inclusive, no carloads of potatoes were shipped from said station of Kennewick, in the State of Washington, upon the lines of defendant Northern Pacific Railway Company, to any of the points of delivery mentioned in the complaint or over the route therein described at a lesser charge than is alleged to have been assessed upon the shipments of potatoes, alleged in the complaint to have been made from said intermediate

points, or any of them, to said points of delivery or any of them.

WHEREFORE, said defendants pray that plaintiff take nothing by its said action and that they may be dismissed hence with their costs.

HENLEY C. BOOTH,  
FRANK B. AUSTIN,  
Attorneys for Defendants. [10]

State of California,  
City and County of San Francisco,—ss.

G. L. King, being first duly sworn, deposes and says, that he is an officer, to wit, assistant secretary of defendant Southern Pacific Company, a corporation, and, as such officer, is duly authorized to and does make this verification for and on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to those matters that he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 28th day of September, 1922.

[Seal] FRANK HARVEY,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Due service of the within answer is admitted this 28th day of September, 1922.

A. J. HARWOOD,  
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 28, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [11]

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(Title of Court and Cause—No. 16741.)

**Trial Stipulation.**

It is stipulated that the allegations of paragraph I of the complaint are true and that no evidence thereof need be offered at the trial.

Dated: March 9, 1923.

ALFRED J. HARWOOD,

Attorney for Plaintiff.

HENLEY C. BOOTH,

FRANK B. AUSTIN,

Attorneys for Defendants.

So ordered.

R. S. BEAN,

Judge.

[Endorsed]: Filed Mch. 12, 1923. Walter B. Maling, Clerk. [12]

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At a stated term, to wit, the March term, A. D. 1923, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the Courtroom in the city and county of San Francisco, on Wednesday, the 14th day of March, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this cause.

(Title of Cause—No. 16741.)

**Minutes of Court—March 14, 1923—Order Allowing Defendant to File an Amendment to Answer.**

\* \* \* \* \*

Ordered that defendant may file an amendment to answer.

\* \* \* \* \*

Defendants moved for a nonsuit on the grounds stated; which motion was submitted after arguments by counsel and being fully considered was denied.

\* \* \* \* \*

[13]

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(Title of Court and Cause—No. 16741.)

**Amendment to Answer.**

Now come the defendants above named, and, by leave of Court first had and obtained, file this their amendment to their answer heretofore filed herein as follows:

**THIRD SEPARATE DEFENSE.**

And for a further, separate and third answer and defense to said complaint, defendants aver that on or about the 11th day of February, 1911, these defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California,



and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington.

On or about the third day of February, 1914, the Interstate Commerce Commission duly gave, made and entered its order, known as Fourth Section Order No. 3700, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof.

That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, 2.7 miles west of said station of Pasco and the same is a point on the said line adjacent and in close proximity to said station of Pasco, and is also intermediate to said California points herein named and said station of Pasco. That on or about the 17th day of May, 1911, the rates on potatoes from Pasco to said California points herein named were extended by said defendants to said station of Kennewick, and ever since that time said rates from Kennewick to said California destinations have been the same as the rates from Pasco to said destinations. [14]

That said application above referred to, which was filed with the Interstate Commerce Commission on or about the 11th day of February, 1911, has never been cancelled or withdrawn, and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission; that said Fourth Section Order No. 3700 has never been vacated, modified or set aside

in whole or in part and was in full force and effect during all the times mentioned in the complaint herein and at the time of the movement of each of the shipments therein referred to, except that section 6 thereof has been eliminated.

H. C. BOOTH,  
F. B. AUSTIN,

Attorneys for Defendants. [15]

State of California,  
City and County of San Francisco,—ss.

G. L. King, being duly sworn, deposes and says: That he is an officer, to wit, assistant secretary of Southern Pacific Company, a corporation, one of the defendants named in the foregoing amendment to answer, and as such officer he is duly authorized to and does make this verification for and on behalf of said corporation; that he has read the foregoing amendment to answer and knows the contents thereof, and the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to such matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 14th day of March, 1923.

[Seal] FRANK HARVEY,  
Notary Public in and for the City and County of  
San Francisco, State of California. [16]

**Exhibit "A."**

“The Commission being of the opinion that the convenience of the carriers, the public, and the

Commission will be better served by assembling in one general fourth section order, divided into numbered sections for convenient tariff reference, the general fourth section orders known as Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12 and experience having suggested certain modifications in the descriptions of conditions under which relief has been afforded by these orders, and certain additional situations as to which carriers may be relieved from the operation of said section, therefore,

“It is ordered, That Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12, be, and the same are hereby, vacated and set aside as of March 15, 1914.

“It is further ordered, That effective March 15, 1914, as to and confined in all cases to rates and fares which are included in and covered by applications for relief from the provisions of the fourth section of the act to regulate commerce that were filed with the Commission on or before February 17, 1911, and until the applications including and covering such rates or fares have been passed on by the Commission, carriers may file with the Commission, in the manner and form prescribed by law and by the Commission’s regulations, such changes in rates and fares as occur in the ordinary course of their business, continuing



higher rates or fares at intermediate points, and through rates or fares higher than the combinations of intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not thereby increased. [17]

“It is further ordered, That as to and confined in all cases to rates which are included in and covered by applications as above described, carriers may file with the Commission, in the manner and form prescribed by law and by the Commission’s regulations, changes in rates under the following conditions, although the discrimination against intermediate points is thereby increased:

“Section 1. A through rate which is in excess of the aggregate of the intermediate rates lawfully published and filed with the Commission may be reduced to equal the sum of the intermediate rates.

“Section 2. Where a through rate has been, or is hereafter, reduced under the authority of section 1 of this order, carriers maintaining through rates via other routes between the same points may meet the rate so made by the route initiating the reduction.

“Section 3. Where a reduction is made in the rate between two points under the authority of section 1 of this order, such reduction may extend to all points in the group which take the same rates as does the point from or to which the rate has been reduced.

“Sec. 4. Where through rates are in effect which exceed the lowest combination of rates lawfully

published and filed with the Commission, carriers may correct said through rates by reducing the same to equal such lowest combination.

“Sec. 5. A longer line or route may reduce the rates in effect between the same points or groups of points to meet the rates of a shorter line or route when the present rates via either line do not conform to the fourth section of the act, under the following circumstances:

(a) Where the longer line is meeting a reduction in rates initiated by the shorter line. [18]

(b) Where the longer line has not at any time heretofore met the rates of the shorter line.

“Sec. 6. A newly constructed line publishing rates from and to its junction points under the authority contained in paragraph (b) of section 5, may establish from and to its local stations rates in harmony with those established from and to junction points.

“Sec. 7. Carriers whose rates between certain points do not conform to the fourth section of the act, which rates have been made lower than rates at intermediate points to meet the competition of water or rail-and-water carriers between the same points, may make such further reductions in rates as may be required to continue to effectively meet the competition of rail-and-water or all-water lines.

“Sec. 8. Where rates are in effect from or to a point that are lower than the rates effective from or to intermediate points, carriers may extend the application of such rates to, or establish rates made with relation thereto at, points on the same line

adjacent or in close proximity thereto, provided that no higher rates are maintained from and to points intermediate to the former point and the new point to which the application of the same or relative rates has been extended.

“Sec. 9. Where there is a rate on a commodity from or to one or more points in an established group of points from and to which rates are ordinarily the same, but the rate on the said commodity does not apply at all points in the said group, such rate may be made applicable to or from all of such other points.

“Sec. 10. Where there is a definite and fixed relation between the rates from and to adjacent or continuous groups of points, and the rates to and from one of said groups are changed, corresponding changes may be made in the rates of the other [19] groups to preserve such relation.

“Sec. 11. In cases where no through rates are in effect via the various routes or gateways between two points, and the combination of lawfully published and filed rates via one gateway makes less than the combination via the other gateway, a through rate may be established on the basis of the combination via the gateway over which the lowest combination can be made, and made applicable via all gateways.

“Sec. 12. In cases where through rates are in effect between two points, via one or more routes or gateways, which are higher than the combination of lawfully published and filed rates via one of these gateways, different carload minima being used on

the opposite sides of the gateway, a through rate may be established equal to the lowest combination of lawfully published and filed rates, using the higher of the carload minima but continuing the present higher through rate if based upon a lower carload minimum.

“The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the act.

“And it is further ordered, That when the Commission passes upon any application for relief from the provisions of the fourth section with respect to the rates referred to herein, the order issued with relation thereto will automatically cancel the authority herein granted as to the rates covered and affected by such order.”

[Endorsed]: Filed Mch. 14, 1923. Walter B. Maling, Clerk. [20]

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(Title of Court.)

KNOX vs. RY. COS.—No. 16746.

LEVY vs. RY. COS.—No. 16741.

MOYSE vs. RY. COS.—No. 16694.

MOYSE vs. DAVIS.—No. 16693.

**(Decision.)**

These four cases, virtually tried as one, involve primarily the long and short haul provisions of the Interstate Commerce Act.

The last thereof in whole and the first and second in part are barred by limitations of said act.

The allegations of the complaints are that in 1920-1922 certain merchandise was shipped over the lines of defendants, from points in Washington to points in California; that the former points are a shorter distance from the latter, over the same route, than Kennewick is; that the joint charges established, demanded and paid upon said shipments were greater than like charges upon like shipments from Kennewick.

The defenses are failure of plaintiffs to seek reparation from the Interstate Commerce Commission; authority from the Act and the Commission to thus charge lower rates from Pasco, 2.7 miles from Kennewick, and which lower rates were extended by defendants to Kennewick, all before the shipments herein; that certain of the shipments were from points on branch lines and not included within the distance from Kennewick to points of destination; that various California statutes of limitation bar the cause of action; and that plaintiffs have not been damaged.

From the evidence it appears and is found that when Sec. 4 of the Act was amended in 1910, the defendants' rates so far as involved herein, were not less from Kennewick than from these points of shipments and were rates lawfully existing. [21] Following the said amendment and on October 14, 1910, the Commission issued an order that carriers might file limited changes in discriminatory rates, and file applications for relief from Sec. 4 in



form in the order prescribed, all until Feb. 17, 1911; that Feb. 11, 1911, defendants filed with the Commission an application for relief from Sec. 4, and filed with it a tariff effective Jan. 15, 1911; that this tariff established a joint rate of 30 cents per hundred on shipments from Pasco to these California points of destination, and a joint rate of 39 cents per hundred on shipments from these Washington points of shipments to said points of destination, which application is yet undetermined; that on May 17, 1911, defendants filed with the Commission a tariff extending the Pasco rate to Kennewick; that on Feb. 3, 1914, the Commission issued an order that until like applications were determined the applicant carriers could further reduce the long haul rates and could extend them to points adjacent or in close proximity, any and all thereof to be filed with the Commission; that some few points of shipments are on spur lines from 2.2 miles to 9.5 miles in length, joining defendants' main line at points 67 and 87 miles from Kennewick.

The plaintiffs are entitled to recover save in so far as barred by the limitations of the Act, viz., to recover upon all items of shipments made within two years prior to complaints filed herein. They were not bound to first seek relief from the Commission, but could as they did proceed to assert their right herein.

See *Davis vs. Parrington*, 281 Fed. 14.

In so far as the points on spur lines are concerned, for all substantial and practical rate-making purposes they are on the "same line or route in the



same direction" as Kennewick, and a distance "shorter being included within the longer distance," within the intent and meaning of Sec. 4 of the Act. [22]

The local charge from them to the main line, added to the long haul charge, will afford compensation for any extra handling. Whether or not defendants' application to be relieved from Sec. 4 was in proper form and time, it affords no protection in respect to the violations of Sec. 4 involved in the charges herein. These violations were by reason of rates initiated subsequent to the amendment of 1910, and so not within the latter's continuance of rates "lawfully existing at the time of the passage of this Act" until applications made to continue them were by the Commission determined. They were only within that provision of Sec. 4 which provided that application for relief could be made and granted "in special cases after investigation." That is, rates to be thus granted or authorized, but which could not be legally charged until thus granted or authorized. In so far as justification for defendants' rates is sought in the Commission's order of Oct. 14, 1914, there is none for the Commission had no power to sanction greater rates for short hauls than for longer hauls, save "in special cases after investigation" as in Sec. 4 provided.

Here was none of this statutory procedure but only a blanket order, unauthorized by the statute.

See U. S. vs. Assoc., 242 U. S. 187.

The same may be said of the Commission's order of Feb. 3, 1914. It was made without authority

and is void, in so far as it purports to sanction violations of the long and short haul clause, by extension or otherwise.

That plaintiffs have been damaged and at least to the extent of the excess of the charges over the Kennewick charge, is settled by *David vs. Parrington, supra*.

However defendants violate the statute by tariffs filed and published, it will be presumed that in the lesser charge for the long haul they have at least reasonable compensation; and hence, obviously the greater charge for the short haul is unreasonable and damaging to the extent of the excess [23] at the very least.

This affords a rule valid and sound in principle, shifting to defendants the burden of evidence to rebut and lessen this *prima facie* proof of damage.

In the matter of attorney's fees, it is believed and found that the reasonable value of his service in this court is—in case No. 16746, \$1100; in case No. 16741, \$600; and in case No. 16694, \$500; a total of \$2200.00. Legal interest from payments made and costs to plaintiffs. Judgments accordingly. The parties will make the computation for purposes of the judgment.

May 30, 1923.

BOURQUIN,  
Judge.

[Endorsed]: Filed June 18, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

At a stated term, to wit, the March Term, A. D. 1923, of the Southern Division of the United States District Court, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 18th day of June, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable MAURICE T. DOOLING, District Judge.

(Title of Cause—No. 16741.)

**Minutes of Court—June 18, 1923—Order for Judgment.**

In accordance with the decision of the Honorable George M. Bourquin, United States District Judge for the District of Montana (before whom this case was heretofore tried), which said decision is this day filed,

IT IS ORDERED that judgment be entered herein in favor of plaintiff and against the defendants upon special findings to be filed. [25]

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(Title of Court and Cause—No. 16741.)

**Findings of Fact and Conclusions of Law.**

The above-entitled action came duly on for trial on the 14th day of March, 1923, the plaintiff being represented by Alfred J. Harwood, its attorney, and the defendants by Messrs. Elmer Westlake, James E. Lyons, and Frank B. Austin, their attorneys.

Said action was tried on the 14th and 15th days of March, 1923, and was thereupon submitted to the Court for its decision. After due consideration the Court makes and files this its decision, embracing its findings of fact and conclusions of law as follows:

I.

That all of the allegations of subdivisions I, II, IV, VI, VII, and VIII of the complaint herein, are true and are sustained by evidence.

II.

That all of the allegations of subdivisions III and V of the complaint, are true and are sustained by the evidence except as otherwise specifically found by finding of fact number IV, and except as otherwise specifically found in finding of fact number IV, all of the allegations of subdivisions III and V of the complaint are true and are sustained by the evidence.

III.

That the reasonable sum to be allowed plaintiffs, for and as attorney's and counsel fees herein, is the sum of Six Hundred (\$600.00) Dollars, which said sum is hereby taxed as part of the costs of the case.

IV.

That the station of Harrah mentioned and described in subdivisions III and V of the complaint is not on the main line of the defendant, Northern Pacific Railway Company, [26] between Kenne-  
wick and Portland, but is on short branch or spur line which connect with said main line between

Kennewick and Portland; that said station is distant 9.5 miles from the main line; that the point from which said branch lines to said station of Harrah diverges from the said main line is more than 67 miles west of Kennewick, and is intermediate between Kennewick and Portland. That in case of shipments from said station of Harrah the plaintiff is not entitled to recover the full amount of the alleged overcharge stated in subdivision V of the complaint, but is entitled to recover the difference between said alleged overcharge and the charge then made by defendant, Northern Pacific Railway Company, for the haul from said station of Harrah to said main line; that the amount of the overcharge on shipments from said station of Harrah is as follows: In the shipment in car No. IC 68852, the amount of the overcharge was and is the sum of \$54.77 instead of the sum of \$79.09 as stated in the complaint. In the case of the shipment in car No. LV 35944 the amount of the overcharge was and is the sum of \$52.24 instead of \$77.38 as stated in the complaint. In the shipment in car No. Erie 61092 the amount of the overcharge was and is the sum of \$49.90 instead of the sum of \$73.92 as stated in the complaint. In the shipment in car No. CGW 30409 the amount of the overcharge was and is the sum of \$50.15 instead of \$74.26 as stated in the complaint. In the shipment in car No. NP 95388, the amount of the overcharge was and is the sum of \$51.12 instead of the sum of \$75.04 as stated in the complaint. That for all practical rate-making purposes said station of Harrah is intermediate between Kenne-



wick and Portland, and also between Kennewick and the stations of delivery.

## V.

With relation to the second separate defense set up in defendants' answer, the Court finds as follows: That the station of Harrah is not on the line of the Northern Pacific Railway Company passing between Portland and Kennewick, but is on short branch line which diverges from [27] said main line, as more specifically appears in finding of fact IV: That for all practical rate-making purposes said station is intermediate between Kennewick and Portland, and between Kennewick and the points of destination mentioned in the complaint.

## VI.

That on October 14, 1910, the Interstate Commerce Commission made an order in the words and figures set forth in Exhibit "A," attached to and made a part of these findings; that on December 16, 1910, the defendants filed with the Interstate Commerce Commission a so-called application for relief from the provisions of the fourth section of the Interstate Commerce Act, a copy of which said so-called application is marked Exhibit "B" and made a part of these findings; that on December 16, 1910, said defendants filed with the Interstate Commerce Commission a so-called application for relief from the provisions of the fourth section of the Interstate Commerce Act, a copy of which said so-called application is marked Exhibit "C" and made a part of these findings.

That on or about the 11th day of February, 1911,



the defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington; that a copy of said application is annexed to and made a part of these findings and marked Exhibit "D."

That on or about February 3d, 1914, the Interstate Commerce Commission made and entered an order denominated, "Fourth Section Order No. 3700"; that the copy of said order, marked Exhibit "A," and attached to the amendment to the answer [28] of the defendants, is a true copy of said order, except that before the part of the said order set forth in said Exhibit "A" the following occurs, viz.:

"In the matter of permitting ordinary changes in rates pending action upon applications for relief from the provisions of the Fourth Section of the Act to Regulate Commerce as amended June 18, 1910."

That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, three miles west of said station of Pasco, and is also intermedi-

ate to said California points named in the complaint, and said station of Pasco. That on or about the 17th day of May, 1911, the rates on potatoes from Pasco to said California points herein named were extended by said defendants to said station of Kennewick, and ever since that time said rates from Kennewick to said California destinations have been the same as the rates from Pasco to said destinations; that said station of Pasco is on the east side and said station of Kennewick is on the west side of the Columbia River.

That said application above referred to, which was filed with the Interstate Commerce Commission on or about the 11th day of February, 1911, has never been cancelled or withdrawn, and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission; that said Fourth Section Order No. 3700 has never been vacated, modified or set aside in whole or in part, except that Section 6 thereof has been eliminated.

#### VII.

That the allegations of the alleged fourth separate defense pleaded in the answer of the defendants are true and are sustained by the evidence.

#### VIII.

That plaintiff has been damaged by the payment of the freight charges mentioned in the complaint; that plaintiff has been damaged by the amount of the overcharges as hereinabove [29] found, plus the interest on each overcharge at the rate of seven

per cent (7%) per annum, from the date of the payment thereof to the date of judgment herein.

### CONCLUSIONS OF LAW.

As conclusions of law from the foregoing findings of fact the Court finds:

#### I.

That plaintiff is entitled to judgment against defendants for the sum of Three Thousand Four Hundred Eighty-five Dollars and Ninety-six Cents (3485.96), being the total amount of the overcharges collected by defendants, together with interest on each separate overcharge at the rate of seven per cent per annum from the date of the payment thereof as alleged in the complaint to the date of judgment; that the total amount of said interest to the 1st day of July, 1923, is the sum of Three Hundred Thirty-nine Dollars and Eighty-four Cents (\$339.84); that the interest on said overcharges amounts to the sum of Sixty-seven Cents (\$.67) per day.

#### II.

That plaintiff is entitled to judgment for the sum of Six Hundred (\$600.00) Dollars as attorney's and counsel fees herein, which said sum shall be taxed as part of the costs of the case.

#### III.

That plaintiff is entitled to judgment for its cost of suit.

Let judgment be entered accordingly.

Dated this 8 day of Aug., 1923.

BOURQUIN,  
District Judge. [30]

**Exhibit "A."**

INTERSTATE COMMERCE COMMISSION.  
ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of October, A. D. 1910. Present:

MARTIN A. KNAPP,  
JUDSON C. CLEMENTS,  
CHARLES A. PROUTY,  
FRANCIS M. COCKRELL,  
FRANKLIN K. LANE,  
EDGAR E. CLARK,  
JAMES S. HARLAN,

Commissioners.

In the Matter of Application for Relief Under the Fourth Section of the Act to Regulate Commerce, as Amended June 18, 1910.

A public hearing having been had, and it appearing that changes in rates and fares occurring in the ordinary course of business should be possible, pending the time when formal applications to be relieved from the requirements of section 4 of the act to regulate commerce are to be filed by the carriers subject to that act:

IT IS ORDERED: That until February 17, 1911, said carriers may file with the Commission, in manner and form as prescribed by law and by the Commission's regulations, such changes in rates and fares as would occur in the ordinary course

of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points, and through rates or fares higher than the combinations of the intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not made greater than that in existence on August 17, 1910, except when a longer line or route reduces rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the short line. The Commission does not hereby approve any rates or fares that may be filed under this permission, all such rates and fares being subject to complaint, investigation, and correction if they conflict [31] with any other provisions of the act.

IT IS FURTHER ORDERED, That such of said carriers as desire to be relieved from any of the requirements of section 4 of the act shall, on or before February 17, 1911, file with the Commission applications as provided in said section 4 and in form as hereinafter prescribed.

Separate applications shall be made as to freight rates and passenger fares. Separate applications shall also be made for relief under the long-and-short-haul provision and for relief under the prohibition against through rates or fares in excess of the combination of the intermediate rates or fares.

Separate application should also be made for different situations governed by different rate adjustments or competitive influences.

Such applications must be certified, and where



the relief sought is the same for two or more carriers in the same territory as to the same traffic application may be made jointly for two or more carriers by a joint agent or attorney, where the rates are contained in a joint tariff a petition from the carrier that issues the tariff, specifying the tariff by I. C. C. number, may be made on behalf of the carriers lawfully parties to the tariff and will be held and considered to be on behalf of all carriers concurring in the tariff.

Application for relief must be made on part of that carrier which actually charges more for the shorter haul than for the longer distance. For example, through rates from C. F. A territory to southeast made in combination on the Ohio River crossings. If the roads north of the river do not charge less for a longer distance haul to the river and the roads south of the river do charge more for a shorter haul, the application should be made on behalf of the roads south of the river.

If a joint rate or fare is reasonably less than the combination of the intermediate rates or fares, the carriers accepting divisions of such joint rate or fare will not [32] ordinarily be held to thereby violate the fourth section of the act.

IT IS FURTHER ORDERED, That the Commission reaffirm its previously expressed view that a through rate or fare that is higher than the combination of the intermediate rates or fares is *prima facie* unreasonable (Rule 56 (b) Tariff Circular 17-A) and will insist upon the application of that principle at the earliest possible date in



every instance except possible extreme and very unusual cases.

IT IS FURTHER ORDERED, That applications for relief from the provisions of the fourth section of the act shall be in such of the following forms as meet the conditions as to which such relief is sought:

(a) The — (name of carrier) —, through — (name of officer or agent making application) its — (Official title) —, petitions the Interstate Commerce Commission for authority to establish rates for the transportation of — (name of commodity or description of traffic) — from — (name or description of point or points of origin) to — (name or description of point or points of destination) — lower than rates concurrently in effect to intermediate points — (names or description of intermediate points) —; the highest charge of such intermediate points to apply at — (name of intermediate point) —, and to be not more than — (cents per 100 pounds, per ton, per car, or per package) — in excess of the rates to — (name of more distant point at which lower rate is proposed) —. This application is based upon the desire of petitioner to meet by direct haul over a longer line or route competitive conditions created at — (name or description of more distant point or points at which lower rates are proposed) — by — (name of railway) —.

NOTE.—The points from and to which the lower rates are desired should be stated specifically [33] whenever practicable. If the ap-

plications applied to a situation in which rates or fares from or to a large number of points are based upon, or bear a fixed relation to, the rate or fare from a basing point to the destination in question, it will be sufficient to so state and to give the highest charge proposed from that basing point and the point at which highest charge will apply. If application refers to a particular commodity as to which it is desired to establish commodity rates from points of production or ports of transshipment, leaving higher class rates to apply from intermediate points, that fact should be stated and the producing points or ports should be named. When it is not practicable to name all the points of origin or destination, and they can be accurately described by well-established and familiar names of traffic territories, such descriptions may be used; for example, "From Atlantic seaboard territory as described in ——— tariff. I. C. C. No. ———" or "From C. F. A. territory."

(b) Same form as (a) shall be used except that the reason which is relied upon as justifying the application shall be stated to be desire to meet by direct haul lower rates fixed at the more distant point by competition of water carriers, specifying whether the competition is created by regular line or so-called "tramp" vessels, and if the former, the name of the line or lines.

(c) Application shall be made in the same form as (a), except that the reason relied upon in support

of same shall be stated to be a desire to meet competition at the more distant point created by water carriers or shorter-line railroad, and to base the rates at intermediate points upon the rate to the more distant competitive point plus a local or charge back. The application shall also show whether the charge for the back haul is the full local or a proportional or an arbitrary rate.

(d) Application shall be made in general form the same as (a), [34] but shall request authority to charge a higher rate as the through route than the aggregate of the intermediate rates subject to the provisions of the act. Application shall state clearly the reasons in support thereof, and shall specify the extent to which it is desired to make the through rate higher than the aggregate of the intermediate rates.

The same forms, modified as may be necessary, shall be used for applications relative to passenger fares, whenever it is practicable the application, either as to freight rates or passenger fares, should cite by I. C. C. numbers the tariff or tariffs in which appear the rates, continuance of which is desired, whenever it is practicable to confine the application to definite points of origin and destination, or to one or more named commodities, that should be done, and whenever practicable the rates themselves should be stated. Each carrier may file as many applications as are necessary to properly present the several situations as to which it desires relief, and it is desirable that each particular situation be treated by itself.

A true copy:

(Signed) EDW. A. MOSELEY,  
Secretary. [35]

**Exhibit "B."**

PACIFIC FREIGHT TARIFF BUREAU.

San Francisco, Cal., December 10, 1910.

To the Interstate Commerce Commission,  
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF PACIFIC FREIGHT TARIFF BUREAU JOINT AND PROPORTIONAL FREIGHT TARIFF NO. 1. I. C. C. NO. 2 OF F. W. GOMPH, AGENT, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

In the name and on behalf of each of the carriers parties to the Tariff named above, the undersigned, acting as Agent and Attorney, or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates shown in above-named Tariff, from and to points named, LOWER than rates concurrently in effect to intermediate points through which traffic moves, in Canada, and in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington, and

points in States east thereof, including District of Columbia.

This application is based upon the desire of the interested carriers to continue the present method, basis or principle of making rates lower at the more distant points than at the intermediate points; such lower rates being necessary by reason of— Competition of various water carriers operating upon the Atlantic and Pacific Oceans; Competition of carriers operating on the Atlantic and Pacific Oceans, partly by water and partly by rail; Competition of various water carriers operating coastwise on the Pacific Ocean; and of carriers partly by water (operating coastwise on the Pacific Ocean and upon the rivers of California and Oregon) and partly by rail between Pacific Coast ports and points in the interior; Rates established via the shorter or more direct routes, and applied via the longer or more circuitous route or routes; Competition between carriers [36] or routes subject to the Act to Regulate Commerce; Competition between Markets of production and distribution.

A further petition is respectfully made asking for authority to waive that portion of the Fourth Section of the Amended Act, which provides that the through rate shall not exceed the aggregate of the intermediate rates subject to the provisions of the Act, or to permit your petitioner to publish in each of its Tariffs a clause as follows:

The aggregate of the local rates (class or commodity) to and from any intermediate point, when



less than the through rates (class or commodity) shown in this Tariff, will apply as the through rate.

OR

The charges collected for the transportation of a shipment from and to, or between, points named in this Tariff and thereby made a part of this Tariff, **MUST NOT EXCEED** what the charges would be by applying thereon the aggregate of lawful intermediate rates in force via the route over which the shipment moved.

LINE OF A GIVEN RAILROAD, there will be found instances where the aggregate of the intermediate rates will be less than the through rates in that Tariff. This condition is almost unavoidable because different bases are used upon different portions of the same line.

F. W. GOMPH,  
Agent.

Subscribed and sworn to before me this tenth (10) day of December, 1910.

PEDRO SAIZ,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires May 26, 1914. [37]



**Exhibit "C."**

PACIFIC FREIGHT TARIFF BUREAU.

San Francisco, Cal., December 10, 1910.

To the Interstate Commerce Commission,  
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF PACIFIC FREIGHT TARIFF BUREAU AND PROPORTIONAL FREIGHT TARIFF NUMBER 1-A, I. C. C. NO. 62 OF F. W. GOMPH, AGENT, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION.

In the name and on behalf of each of the carriers that are parties to the above-named tariff the undersigned as agent and attorney or under authority of concurrences on file with the Commission from each of said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates shown in the above-named tariffs between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles and other points in California named in said tariff *and* Spokane, Walla Walla, Washington, Pendleton and Baker City, Oregon, and Warden, Osborne, Mullen, Idaho, and other points in Oregon, Washington and Idaho named in said tariff lower than the rates concurrently in effect at intermediate points on the Northern Pacific Railway.

This application is based on the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route, competitive conditions created at Bunn, Burke, Dorn, Gem, Hecla, Larson, Mine, Mullen, Wall and Warden, Idaho by the Oregon Washington Railway and Navigation Co. met by the Northern Pacific via Paradise and St. Regis, Montana, the longer and more circuitous route, but not applicable at Intermediate points along that line between Wauser and Larson, Idaho for the reason that short line competition does not exist at such intermediate points.

It is not practical to state in this petition the [38] rates in detail nor specify the higher charge at intermediate points nor the extent to which rates at the intermediate points exceed the rates at the more distant points named.

F. W. GOMPH,  
Agent.

Subscribed and sworn to before me this 10th day of December, 1910.

P. SAIZ,  
Notary Public in and for the City and County of  
San Francisco, State of California. [39]

**Exhibit "D."**

PACIFIC FREIGHT TARIFF BUREAU

San Francisco, Cal., February 11, 1911.

PETITION No. 2.

To the INTERSTATE COMMERCE COMMISSION,

Washington D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF TARIFF NO. 1-A, I. C. C. No. 62 OF F. W. GOMPH, AGENT.

In the name and on behalf of each of the carriers parties to the Tariff above-named, the undersigned, acting as Agent and Attorney, or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates in above-named Tariff, between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles, Cal., and other points in California named in said Tariff, *and* Pasco, Wash., lower than the rates to points on the Northern Pacific Railway, intermediate to Pasco, Wash.

This application is based upon the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route competitive conditions created at points directly competitive with Pasco, Wash., such as Wallula and Hunts Junction, Wash.,

by the Oregon-Washington Railroad and Navigation Co.

It is not practicable in this petition to state the rates in detail nor to specify the highest charge at intermediate points, nor the extent to which rates at the intermediate points exceed the rates at the more distant points named above.

F. W. GOMPH,  
Agent.

Subscribed and sworn to before me this 11th day of February, 1911.

P. SAIZ,  
Notary Public in and for the City and County of  
San Francisco, California.

Service and receipt of a copy of the within findings of fact is hereby admitted this 30th day of June, 1923.

ELMER WESTLAKE,  
J. E. LYONS,  
Attorneys for Defendants.

[Endorsed]: Filed August 14, 1923. Walter B. Maling, Clerk. [40]

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(Title of Court and Cause—No. 16741.)

### **Judgment on Findings.**

This cause having come on regularly for trial upon the 14th day of March, 1923, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed; A. J. Harwood, Esq., appearing as attorney for plaintiff

and Frank B. Austin and Elmer Westlake, Esqs., appearing as attorneys for defendants and the trial having been proceeded with on the 15th day of March, 1923, and oral and documentary evidence having been introduced on behalf of the respective parties and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation having filed its opinion and its findings in writing and ordered that judgment be entered herein in accordance with said findings:

Now therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that A. Levy & J. Zentner Company, a corporation, plaintiff, do have and recover of and from Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, defendants, the sum of Three Thousand Eight Hundred Fifty-five and 95/100 (\$3,855.95) Dollars, together with \$600.00 as attorney's fees and for costs herein expended taxed at \$—.

Judgment entered August 14, 1923.

WALTER B. MALING,  
Clerk. [41]

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(Title of Court and Cause—No. 16,741, No. 16,746,  
No. 16,694.)

**Stipulation and Order for Preparation of Single  
Bill of Exceptions.**

It is hereby stipulated that a single bill of exceptions may be prepared and signed covering the record in the above-entitled [42] actions in lieu



of separate bills of exceptions covering each case, and that said single bill of exceptions so prepared shall serve and be used as the bill of exceptions in each case.

Dated, San Francisco, September 5th, 1923.

ALFRED J. HARWOOD,

Attorney for Plaintiffs in Each of Said Cases.

H. C. BOOTH,

ELMER WESTLAKE,

JAMES E. LYONS,

Attorneys for Defendants in Each of Said Cases.

So ordered.

JOHN S. PARTRIDGE,

United States District Judge.

[Endorsed]: Filed Sept. 8, 1923. W. B. Mal-  
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[43]

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(Title of Court and Cause—No. 16741.)

**Stipulation and Order Extending Time to and In-  
cluding September 27, 1923, to File Bill of Ex-  
ceptions.**

It is hereby stipulated that the defendants have until and including September 27th, 1923, in which to prepare and serve on the plaintiffs a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,

Attorney for Plaintiffs.

HENLEY C. BOOTH,

ELMER WESTLAKE,

JAS. E. LYONS,

Attorneys for Defendants.

So ordered.

PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Sept. 18, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [44]

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(Title of Court and Cause—No. 16741.)

**Stipulation and Order Extending Time to and Including October 15, 1923, to File Bill of Exceptions.**

It is hereby stipulated that the defendants have until and including October 15th, 1923, in which to prepare and serve on the plaintiff a draft of the proposed bill of exceptions in the above-entitled action.

ALFRED J. HARWOOD,  
Attorney for Plaintiff.

HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,  
Attorneys for Defendants.

So ordered.

PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Sep. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [45]

(Title of Court and Cause—No. 16741.)

**Stipulation and Order Extending Time to and Including October 25, 1923, to File Bill of Exceptions.**

It is hereby stipulated that the defendants have until and including October 25, 1923, in which to prepare and serve on the plaintiff a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,  
Attorney for Plaintiff.  
H. C. BOOTH,  
ELMER WESTLAKE,  
JAS. E. LYONS,  
Attorneys for Defendants.

So ordered.

PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Oct. 11, 1923. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [46]

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(Title of Court and Cause—No. 16741.)

**Stipulation and Order Extending Time to and Including November 10, 1923, to File Bill of Exceptions.**

It is hereby stipulated that the defendants have until and including November 10, 1923, in which to prepare and serve on the plaintiff a draft of the

proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,  
Attorney for Plaintiff.  
HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAS. E. LYONS,  
Attorneys for Defendants.

So ordered.

PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Oct, 24, 1923. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [47]

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(Title of Court and Cause—No. 16741, No. 16746,  
No. 16694.)

### **Bill of Exceptions.**

BE IT REMEMBERED that on March 14th and 15th, 1923, the above-entitled causes came on for hearing before Hon. George [48] M. Bourquin, Judge of said court, a jury having been duly waived by both parties. The plaintiffs appeared by Alfred J. Harwood, Esq., their counsel, and the defendants appeared by Messrs. Frank B. Austin and Elmer Westlake, their counsel, whereupon the following proceedings, and none others, were had:

By stipulation of all the parties in open court, the cases were consolidated for trial and disposition.

Mr. HARWOOD.—May it please the Court, these cases are practically all the same, that is to say, they are all for the recovery of overcharges for violations of the long and short haul clause of the Interstate Commerce Act. For instance, taking the first case, 16,693, which will first be tried, it is alleged in the complaint that the Northern Pacific Railway Company and Southern Pacific Company established a through route and joint rate on potatoes, from Kennewick to points in California, and in this through route and joint rate they all participated. The shipments of potatoes in this case moved from points west of Kennewick to points in California, and the rate charged on these potatoes was a higher rate than the rate from Kennewick to these points in California, thereby being a violation of the terms of the long and short haul clause of the Interstate Commerce Act. Practically all of the allegations of the complaint are admitted by the answer, but I will offer in evidence a stipulation which has been signed and which was filed on the 12th of March in this case, reading as follows:

“It is stipulated that all of the allegations of paragraphs I and X of the complaint herein are true, and that no evidence need be offered at the trial. This stipulation implies no admission as to the validity of the assignment referred to in Paragraph I.” [49]

May it please your Honor, there is an assignment alleged from the corporation of Jacobs, Malcolm and Burtt to the copartnership of Jacobs, Malcolm



and Burtt, and this being a suit against the United States, it is contended that this assignment was invalid, and therefore as to the claims assigned the plaintiff could not recover.

“It is further stipulated that the allegations of the complaint denied by the following part of the answer are true, and that no evidence thereof need be offered at the trial. The part of said answer referred to is as follows:

“ ‘Defendant avers that he has not sufficient knowledge, information or belief upon the subject to enable him to answer the allegations of paragraph VII of the complaint with respect to the shipments consigned to, or charges paid by, either the corporation or the partnership known as Jacobs, Malcolm & Burtt, and, upon that ground, defendant denies that all, or any, of said shipments which were made during the year 1918, prior to the 15th day of November of said year, were made by Jacobs, Malcolm & Burtt, a corporation, or that the charges paid upon said shipments, or any of them, to defendant, were paid by said Jacobs, Malcolm & Burtt, a corporation; and denies that all, or any, of said shipments made in the year 1918 subsequent to November 15 of said year, or in the year 1919, were made by said copartnership of Jacobs, Malcolm & Burtt, or that the charges paid upon said shipments, or any of them, to the defendant, were paid by said copartnership.’ ”

I offer this in evidence as Plaintiff's Exhibit 1.

The COURT.—They withdraw that denial and admit the allegations of the complaint?

Mr. HARWOOD.—They withdraw the denials of this paragraph.

There is another allegation of the complaint which is denied. These shipments were made from various cities on the line [50] of the Northern Pacific, and one of the stations is the station of Moxee, on their line between Kennewick and points of destination, but off the main line, in other words, a branch point. It is the plaintiff's contention that for all practical rate-making purposes this station is the same as if it were on the line, and in support of the allegations of the complaint plaintiff would ask a stipulation that the station at Moxee is on a branch line of the Northern Pacific, nine miles from the main line.

Mr. WESTLAKE.—From what source did you get the distance?

Mr. HARWOOD.—I got the distance by calling up the Northern Pacific, and they looked up the official distance from the station and gave it to us.

Mr. WESTLAKE.—If you will add to that it is not intermediate between Kennewick and these points in California, we are willing to agree to it.

Mr. HARWOOD.—I think the question whether it is intermediate or not is a question of law. I am willing to make this stipulation, that the distance is 9 miles from the main line, that is, the distance from Moxee to the main line is nine miles, and if that is incorrect, and you find it so at any time before the case is closed, it may be changed accordingly.

Mr. WESTLAKE.—That is all right.

Mr. HARWOOD.—In paragraph III of the complaint there is an allegation reading as follows :

“That at all times herein mentioned, each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one State or Territory of the United States to other States and Territories thereof.”

That allegation is denied on the presumption or based upon the fact that during this time the Government had taken over the [51] operation of the railroads.

Mr. WESTLAKE.—That is correct. And at that time the Government was engaged exclusively in the operation of these railroads.

Mr. HARWOOD.—But, nevertheless, the defendants both at that time were common carriers, although they were not engaged in carrying over this particular road.

Mr. AUSTIN.—They were in existence as corporations, but their railroads were not being operated by them.

The COURT.—Is this suit against the railroads?

Mr. HARWOOD.—No, your Honor. The suit is against James C. Davis, the agent appointed by the President.

### **Testimony of A. J. Harwood, for Plaintiffs.**

A. J. HARWOOD was called as a witness for the plaintiffs, and, being first duly sworn, testified as follows :

The WITNESS.—I am an attorney practicing

(Testimony of A. J. Harwood.)

in the State courts of California, and also in the United States courts. In my opinion the reasonable value of the services of the plaintiff's attorney in this case (No. 16693) is the sum of \$450.00. The amount sued for is \$1861.00 and interest. (Tr. 5 and 6.)

Cross-examination.

(By Mr. AUSTIN.)

Q. Mr. Harwood, how much time have you spent on this particular case; what have you done?

A. Preparation of the complaint, examination of law, examination of the various separate defenses set up in the answer, and the preparation for the trial. It would be difficult to say just how much time I have spent on this particular case, because there are three other cases which involve more or less the same questions, [52] and those cases were worked on by me at the same time.

WITNESS.—(Continuing.) The same questions are not entirely involved in all of the cases. They are in many respects, however, similar. I believe in different cases there are different and separate defenses set up. In this particular case all of the separate defenses set up in the other cases are included, whereas in some of the other cases some of the separate defenses set up in this case are not included, so that there was no work involved in this case which was not involved in the other cases (Tr. 6). In all of these cases I am requesting fees based upon practically 25 per cent of the amount sued for. In case 16694 I am asking for \$700.00;

(Testimony of A. J. Harwood.)

in case 16741, \$1,000.00; and in case 16746, \$2,000.00. In all of these cases together many days' time were spent in preparation of the pleadings, and in the preparation for the trial of these cases,—somewhere between 15 and 20 days in the four cases (Tr. 7). I spent several days in examination of questions of law. (Tr. 8.) I have been preparing for the trial for the last four or five days. The case involves no preparation of facts, the facts being virtually admitted by the pleadings, except in so far as preparation of the stipulations was concerned (Tr. 8). There is one other matter I wish to testify to before leaving the stand. Prior to December 22, 1918, the firm of Jacobs, Malcolm & Burt was a corporation, and on that date it was dissolved by a decree of the Superior Court of the City and County of San Francisco, and all of the assets of the corporation were on that date distributed to the stockholders of the corporation, who are the members of the firm of the copartnership of Jacobs, Malcolm & Burt, the plaintiffs in this case. (Tr. 8.)

Taking up case No. 16,694, which is the case of Joseph Moyse and A. P. Jacobs, copartners doing business under the firm name and style of Jacobs, Malcolm & Burt vs. Northern [53] Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, I offer in evidence a stipulation entered into in this case reading as follows:

“Trial Stipulation. It is stipulated that all of the allegations of paragraphs I and IX of



the complaint are true, and that no evidence thereof need be offered at the trial.

“It is further stipulated that the allegations of the complaint denied by the following part of the answer are true, and that no evidence thereof need be offered at the trial. The part of said answer referred to is as follows: ‘Defendants aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer the allegations of paragraph V of the complaint with respect to the shipments consigned to, or charges paid by, either the corporation or the partnership known as Jacobs, Malcolm & Burtt, and, upon that ground, deny that all, or any, of said shipments which were made during the year 1917, were made by Jacobs, Malcolm & Burtt, a corporation, or that the charges paid upon said shipments, or any of them, to defendants, or either of them, were paid by said Jacobs, Malcolm & Burtt, a corporation, and deny that all, or any, of said shipments made in the years 1920, 1921 or 1922, or during any part thereof, were made by said copartnership of Jacobs, Malcolm & Burtt, or that the charges paid upon said shipments, or any of them, to the defendants, or either of them, were paid by said copartnership. Dated March 9, 1923,’”

and signed by the parties and approved by the court.

I will ask that that be marked Plaintiffs' Exhibit 1.

Gentlemen, in this case there are several stations which are not directly on the main line, they are the stations of Yethanot, Moxee, Farron, Harrah, Ashue, and Cowiche, that is, those stations from which some of these shipments were made are not directly on the main line, and I would ask a stipulation of [54] counsel subject to their right to correct these figures if they are not correct before the trial closes, that Yethanot is 2.2 miles from the main line; that Farron is 8.1 miles; that Harrah is 9.5 miles; that Ashue is 5.2 miles, and that Cowiche is 9.2 miles; and that Midvale, one station I did not mention, is three miles from the main line. (Tr. 9 and 10.)

Mr. HARWOOD.—It will be stipulated that these points are on branch lines of the Northern Pacific, all making into the main line this side of Kennewick. That would include Moxee.

Mr. AUSTIN.—That will all be stipulated. (Tr. 11.)

Mr. HARWOOD.—I am asking \$700.00 in Case 16,694. (Tr. 11.)

(It was stipulated that the testimony given by Mr. Harwood in case 16,693 may stand in case 16,694, and in the other two cases.) (Tr. 11.)

Mr. HARWOOD.—That is all of the evidence in 16,694, and pursuant to the stipulation made at the termination of No. 16,693, I will put the evidence in in the next case, No. 16,741, entitled A.

Levy and J. Zentner Company, a corporation, Plaintiff, vs. Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation; and in that case I offer in evidence a trial stipulation, dated March 9, between the counsel in this case, reading as follows:

“It is stipulated that the allegations of paragraph I of the complaint are true, and that no evidence thereof need be offered at the trial.”

We ask that that be marked Plaintiff's Exhibit 1 in this case.

The station of Harrah, which is not directly on the main line, is involved in this case, and will it be stipulated, subject to correction, that Harrah is  $9\frac{1}{2}$  miles from the main line? [55]

Mr. AUSTIN.—You got that from the same source?

Mr. HARWOOD.—Yes. It will stand on the stipulation that it is on a branch line,  $9\frac{1}{2}$  miles from the main line, and that the junction point is this side of Kennewick.

Mr. AUSTIN.—You mean west?

Mr. HARWOOD.—West of Kennewick, or toward California.

Mr. AUSTIN.—That stipulation is made, subject to correction.

Mr. HARWOOD.—It is understood that my testimony regarding attorney's fees in this case was \$1,000: Is that correct?

Mr. AUSTIN.—Yes, and that your testimony given in 16,693 will be the same as in this case.

Mr. HARWOOD.—And that the fee mentioned was \$1,000.00?

Mr. AUSTIN.—Yes.

Mr. HARWOOD.—That is all of plaintiff's proof in this case. (Tr. 11 and 12.)

Mr. HARWOOD.—The next case is 16,746, A. W. Knox vs. Northern Pacific Ry. Co., a corporation, and Southern Pacific Company, a corporation. In this case several shippers, three or four shippers, were involved, and Mr. Knox is their assignee. I offer in evidence in this case a stipulation dated March 9, reading as follows:

“It is stipulated that the allegations of paragraphs VII and IX of the first cause of action stated in the complaint are true, and that no evidence thereof need be offered at the trial.

“It is stipulated that the allegations of paragraph VII of the second, third and fourth causes of action stated in the complaint are true, and that no evidence thereof need be offered at the trial.”

We ask that that be marked Plaintiff's Exhibit 1.

In this case, certain stations, Midvale, Ashue, Harrah, and Cowiche are on branch lines. Will it be stipulated that [56] Midvale is three miles from the main line, Oshue is 5.2 miles from the main line, that Harrah is 9.5 miles from the main line, and that Cowiche is 9.2 miles from the main line, this stipulation to be subject to your right

to correct it at any time before the close of the trial?

Mr. AUSTIN.—Yes. It will also be stipulated that they are on branch lines?

Mr. HARWOOD.—It is also stipulated they are on branch lines; and will it be stipulated that the junction point where they join the main line is west of Kennewick?

Mr. AUSTIN.—Yes.

Mr. HARWOOD.—It is understood, is it, that my testimony regarding the attorney's fee in this case was that a reasonable fee was \$2,000.00.

Mr. AUSTIN.—That will be also understood. Also that the testimony given in No. 16,693 will be considered in this case. (Tr. 12 and 13.)

Mr. HARWOOD.—In connection with the first case (16,693), if your Honor please, I would like permission to file an amendment to the complaint, alleging the dissolution of the copartnership of Jacobs, Malcolm, & Burtt on the 22d of December, 1918, and that upon that dissolution all of the assets of the copartnership were distributed to the copartners, who were the same persons as stockholders in Jacobs, Malcolm & Burtt, a corporation. I want to make this allegation to overcome the objection that there was an assignment here contrary to Federal law preventing assignments in causes of action against the United States Government. I would like permission to file this amendment sometime this afternoon. (Tr. 14.)

Mr. AUSTIN.—We, also, in turn, would like to



submit an amendment in this case. The amendment involves the third separate defense set forth in each of the answers (Tr. 14).

The COURT.—I will allow the amendment to be made, [57] and if counsel desire a continuance they can have it. (Tr. 19.)

(The amendments to each of the answers in all of said cases were served and filed March 14, 1923, and constitute a part of the judgment-roll in each of said cases.)

Mr. AUSTIN.—Do I understand that the plaintiff rests in all of these cases?

Mr. HARWOOD.—Yes. (Tr. 20.)

Mr. AUSTIN.—If your Honor please, at this time we wish to make a motion for a nonsuit, and we base that upon several grounds. There is this ground which exists in all of the cases, namely, that the plaintiff in all of these cases has failed to prove the allegation of his complaint that the Interstate Commerce Commission never authorized the defendant carriers, or the president in case No. 16,693, to charge less from Kennewick to San Francisco than from intermediate stations to San Francisco. That allegation is repeated in the complaints; in some of them they specifically mention San Francisco and in others they mention other points of destination, but in substance it is the same. We have denied that allegation in each of our answers, and we submit that the plaintiff has failed to make a case because of failure to prove that allegation.

The Fourth Section of the Interstate Commerce Commission Act prohibits the charging of more from an intermediate point than from the more distant point, and then contains a proviso reading as follows:

“Provided further that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor, in any case where application shall have been filed before the Commission in accordance with the [58] provisions of this section until a determination of such application by the Commission.”

They have failed to prove, although they allege the fact, and we deny it, that the Interstate Commerce Commission has not relieved the carrier from the provisions of the fourth section violation, which apparently existed in this case, and we submit that having alleged that in the complaint, the burden rests upon them to prove it.

There are other points which we make in these cases.

In the first case, *Moyse vs. Davis*, No. 16,693, we make the point that this court has no jurisdiction of the cause of action, that jurisdiction is vested exclusively in the Interstate Commerce Commission; that by the provisions of Section 206 of the Transportation Act, the Interstate Commerce Commission has been vested with the exclusive jurisdiction

to pass upon claims of this nature, and this Court has no jurisdiction to pass upon such claims until after the Interstate Commerce Commission has first heard them.

In that case, it is alleged and admitted by the trial stipulation that the corporation, Jacobs, Malcolm & Burt assigned to the partnership which succeeded it the claim for damages covering these alleged overcharges which were paid by the corporation through the period of its existence. In that trial stipulation we reserved any objection as to the validity of the assignment.

Now, in this case we contend that the assignment is void under the provisions of Section 3477 of the Revised Statutes, which is Section 6383 of the United States Compiled Statutes of 1916, which prohibits assignments of claims against the United States, except when executed in the form prescribed by that statute. I have that section here. It reads:

“All transfers and assignments made of any claim upon the [59] United States, or of any part or share thereof, or interest therein, whether or absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due,

and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

It is not shown that the assignment in this case was executed in conformity with that provision, and this being a claim against the United States, we contend that it is covered by that section.

It was held in the case of *Missouri Pacific vs. Ault*, 256 U. S. 554, that claims against the Director General are, in effect, claims against the United States, and under that theory we believe that assignments of this character fall directly within the provisions of the statute to which we have referred.

We also urge in our application for a nonsuit that the plaintiff in each of these cases has failed to show that there was any movement or shipment of potatoes from the more distant point, that is, Kennewick, to any of the points of destination during the time that any of the shipments involved in this case moved, and, therefore, he has failed to prove any damages. [60]

We also make the point that the complaint merely

alleges a violation of the long and short haul clause, that the rates paid at the more distant point were a less amount, and he has not alleged or proved any damage; he has not shown wherein he has been injured. This is another ground in support of our contention for a nonsuit. (Tr. 20 to 23.)

We have also, in these cases, pleaded the statute of limitations, Section 338 and Section 339 of the California Code of Civil Procedure. We include the defense we have raised in our answer as to the statute of limitations in our motion for a nonsuit. (Tr. 26.)

The COURT.—In view of the fact that this case is tried by the Court, and will apparently ultimately turn upon law points, not a great volume of evidence, the Court has come to the conclusion that at least tentatively it will overrule the motion for a nonsuit. If, however, there is any point advanced in the motion by counsel for the defendant which he is entitled to the benefit of and is in conformity with the proof, of course he will get a like benefit in the final decision. (Tr. 36.)

The COURT.—As to the question of statute of limitations, I am not clear whether or not the first case may not be barred, but I hold it in abeyance for the final decision, so the motion for a nonsuit will be denied, an exception will be noted, and the defense may proceed with their case in all four cases. (Tr. 37 and 38.)

EXCEPTION No. 1.



TESTIMONY FOR DEFENDANTS.

**Testimony of F. W. Gomp, for Defendant.**

F. W. GOMPH was thereupon called as a witness for defendant in all four cases above referred to, and, being first duly sworn, testified as follows:  
[61]

The WITNESS.—I live at San Francisco. I am agent for the Pacific Freight Tariff Bureau, by which I mean that under authority of powers of attorney executed by various railroads, I act as their publishing agent in the matter of issuing and filing freight tariffs and classifications with the Interstate Commerce Commission and the State Railroad Commissions. I have been such agent since 1909. That was continuous up to the time the railroads went under federal control, and during the period of federal control I acted as the agent of the United States Railroad Administration. On the termination of federal control, the Pacific Freight Tariff Bureau was reorganized by the carriers (Tr. 38).

Q. (By Mr. WESTLAKE.) Included among the carriers for whom you were such representative were the Southern Pacific and the Northern Pacific included?

A. The Southern Pacific was a power of attorney line. The Northern Pacific was a line which concurred in the tariffs issued by me as the agent of the Southern Pacific, being under that company's power of attorney.

(Testimony of F. W. Gomph.)

Q. What do you mean by a power of attorney line?

A. In the organization of the Pacific Freight Tariff Bureau certain railroads associated themselves, and in order to give effect to the tariffs which these associated lines may issue, the Interstate Commerce Commission provided what is known as a power of attorney which they must execute to me as agent, the original of which is filed with the Interstate Commerce Commission. (Tr. 38 and 39.)

WITNESS.—(Continuing.) I hold such power of attorney from Southern Pacific Company, beginning as early as January, 1910, down to date. During the times mentioned in these complaints and as far back as January 1, 1911, the Northern Pacific was a concurring line. (Tr. 39.) I have made an [62] examination of the tariffs to determine whether or not the carriers involved in this proceeding had fourth section relief with respect to intermediate points west of Kennewick, as compared with the rates from Kennewick. (Tr. 39 and 40.)

In 1910, the Interstate Commerce Act really placed upon the Interstate Commerce Commission the burden of carrying out the provisions of the act with respect to rates then in effect, and which might thereafter be established, which were greater for a shorter haul than for a longer haul, the shorter being included within the longer. (Tr. 41.) By an order dated October 14, 1910, entitled "In the matter of application for relief under the Fourth

(Testimony of F. W. Gomph.)

Section of the Act to Regulate Commerce, as amended June 18, 1910," the Interstate Commerce Commission states:

"A public hearing having been had and it appearing that a change in rates and fares occurring in the ordinary course of business should be possible pending the time when formal applications to be relieved from the requirements of Section 4 of the Act to Regulate Commerce are to be filed by the carriers subject to that act:

"It is ordered that until February 17, 1911, said carriers may file with the Commission, in manner and form prescribed by law and by the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points, and through rates or fares higher than the combinations of the intermediate rates or fares, provided that in so doing, the discrimination against intermediate points is not made greater than that in existence on August 17, 1910, except when a longer line or route reduces rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the short line. The Commission does not hereby [63] approve any rates or fares that may be filed under this permission, all such rates and fares being subject to complaint, investi-

(Testimony of F. W. Gomph.)

gation, and correction if they conflict with any other provisions of the Act.”

Now this order then goes on to prescribe the form in which the carriers shall make their applications for relief from the fourth section. (Tr. 42 and 43.)

(The order to which the witness referred was thereupon received in evidence as Defendant’s Exhibit “A” — Tr. 45 — and is set forth in full in “Appendix A” to this bill of exceptions.)

WITNESS.—(Continuing.) Following the terms of that order, I was instructed by the railroads for which I acted to file with the Interstate Commerce Commission a fourth section application covering the rates in the various tariffs that I published which did not conform with the provisions of the fourth section. One of these applications covered the tariff which names the rate between the points in California, on the one hand, and Pasco, Washington, on the other. The Northern Pacific Railroad extending westward from Pasco, over the Cascade Mountains through Tacoma and back into Portland was party to that tariff. The Oregon-Washington Railroad & Navigation Company extending from a point in the vicinity of Pasco to Portland, Oregon, along the Columbia River, was the other party to that tariff, and was the short line. The rates in the tariff as between the points in California, on the one hand, and Pasco, Washington, on the other, did

(Testimony of F. W. Gomph.)

not apply at points on the Northern Pacific Railroad between Pasco and Portland (Tr. 43 and 44).

Therefore there were rates from points on the Northern Pacific west of Pasco to points in California which were higher than the rates from Pasco proper, constituting a departure from the fourth section of the Act; to protect the carriers in [64] that departure under the order of the Commission dated October 14, 1910, I filed on behalf of the Southern Pacific and the Northern Pacific Railroad petition No. 2 dated February 11, 1911, entitled Application for relief from provisions of fourth section of amended commerce act for account of Tariff No. 1-A, I. C. C. No. 62 of F. W. Gomph, Agent. (Tr. 44 and 45.)

Mr. WESTLAKE.—Q. I now show you, Mr. Gomph, what purports to be a copy of Petition No. 2, to which you referred, duly certified by the Interstate Commerce Commission, and ask you whether that is the petition to which you referred?

A. Yes. (Tr. 45.)

(Petition No. 2, to which the witness referred, was received in evidence as Exhibit "B," a copy of which is fully set forth in "Appendix B" to this bill of exceptions—Tr. 48.)

WITNESS. — (Continuing.) Petition No. 2, dated February 11, 1911, which was offered this morning as Exhibit "B" was what might be termed a petition in detail and was filed subsequent to what has been termed by the carriers and the Interstate Commerce Commission an omnibus application. (Tr. 48.)



(Testimony of F. W. Gomph.)

I now offer for the account of Pacific Freight Tariff Bureau joint and proportional freight tariff No. 1, I. C. C. No. 2, a Fourth Section application to the Interstate Commerce Commission, dated December 10, 1910. (Tr. 49.)

(The document above referred to was received in evidence as Defendant's Exhibit "C,"—Tr. 49—and is attached to this bill of exceptions as "Appendix C.")

WITNESS.—(Continuing.) I now offer Pacific Freight Tariff Bureau Tariff No. 1, I. C. C. No. 2, to which that omnibus application refers (Tr. 50).

(The tariff referred to was received in evidence as Defendant's Exhibit "D" and is attached to this bill of exceptions as "Appendix D.") [65]

WITNESS.—(Continuing.) I now offer Fourth Section application to the Interstate Commerce Commission for account of Pacific Freight Tariff Bureau, Joint and Proportional Freight Tariff No. 1-A, I. C. C. No. 62, filed December 10, 1910. I offer that together with the tariff.

Mr. WESTLAKE.—I offer these two documents in evidence as Defendant's Exhibits "E" and "F," respectively, the tariff referred to being I. C. C. No. 62, Pacific Freight Tariff Bureau, Joint Proportional Freight Tariff No. 1-A. (Tr. 51.)

(The two documents referred to were received in evidence as Defendant's Exhibits "E" and "F," respectively, and are attached to this bill of exceptions as "Appendices E and F," respectively.)

WITNESS.—(Continuing.) In February, 1911,

(Testimony of F. W. Gompf.)

the Oregon-Washington Railroad & Navigation Company built its line or extended its line from Wallula westward through Kennewick to North Yakima. That line, with respect to Portland, Oregon, is the short line. The Northern Pacific Railroad paralleled the Oregon-Washington Railroad & Navigation Company from Kennewick to North Yakima, and is the long line with respect to Portland, Oregon. In supplement No. 2, to Pacific Freight Tariff Bureau, Tariff No. 1-A, I. C. C. No. 62, rates were published from Kennewick, Washington, on the Oregon-Washington Railroad & Navigation Co. applicable by that line from Portland, Oregon, to California points, and *vice versa*. (Tr. 52.)

(The document referred to, known as Supplement No. 2 to I. C. C. Tariff No. 62, effective May 17, 1911, and consisting of two leaves or four pages, was received in evidence as Defendant's Exhibit "G" and is attached to this bill of exceptions as "Appendix G.") [66]

WITNESS.—(Continuing.) In this supplement, rates were published from Kennewick, the point on the Northern Pacific Railroad applicable via Portland, Oregon, over this long line to meet the short line rates from Kennewick via the Oregon-Washington Railroad & Navigation Company, under authority of a Fourth Section order issued by the Interstate Commerce Commission (Tr. 53). The authority is contained in the Interstate Commerce Commission's Fourth Section order dated October

(Testimony of F. W. Gomph.)

14, 1910, received in evidence as Defendant's Exhibit "A" (Tr. 53). The Fourth Section application filed as Defendant's Exhibits "B," "C," and "E," are pending with the Interstate Commerce Commission, a hearing has not been held and a decision has not been rendered.

Mr. WESTLAKE.—I now offer as Defendant's Exhibit "H" Fourth Section Order No. 3700. (Tr. 54.)

(Said Fourth Section Order No. 3700 was thereupon received in evidence as Defendant's Exhibit "H" and is reproduced as "Appendix H" to this bill of exceptions.)

Mr. WESTLAKE.—I now offer in evidence, if your Honor please, Supplement No. 1 to Fourth Section Order No. 3700, and ask that it be marked Defendants' Exhibit "I."

(Said document was thereupon received in evidence as Defendants' Exhibit "I" and is reproduced as "Appendix I" to this bill of exceptions.)

Mr. HARWOOD.—Without waiving the objection, or any objection made in the case to any of the so-called applications or the order of the Commission, or the tariffs offered in evidence, the plaintiff admits that Mr. Gomph had due authority from the Northern Pacific Railway Company and the Southern Pacific Company to make any applications, or any so-called applications made by him. (Tr. 57.) [67]

**Testimony of M. A. Cummings, for Defendants.**

M. A. CUMMINGS was thereupon called as a witness for the defendants in all of the four cases above referred to, and, being first duly sworn, testified as follows:

My name is M. A. Cummings. I reside at Oakland, California. (Tr. 57.) I am Assistant General Freight Agent, Southern Pacific Company, San Francisco, California. I have held that position for five years, but I have been in the service of the Freight Traffic department of the Southern Pacific Company for twenty-three years. In a general way, briefly, my traffic experience has consisted of making rates, negotiating divisions, and all forms of freight traffic work in all of its aspects, as contemplated by the major freight traffic department.

Q. (By Mr. AUSTIN.) Have you before you the tariff which was in effect or the tariffs which were in effect at the time the application was made to the Commission for relief at Pasco, as shown in Exhibit "B"?

A. I have photographic copies of the relevant parts of these tariffs. (Tr. 58.)

The COURT.—The Court will allow them to be introduced subject to objection. (Tr. 60.)

(In view of counsel's objection to photographic copies of the tariffs being received in evidence, the original tariffs were offered and received in evi-

(Testimony of M. A. Cummings.)

dence and the subsequent testimony will refer to such original tariffs.)

Mr. AUSTIN.—Will you do this, will you examine these tariffs and suggest such other pages as you want?

Mr. HARWOOD.—Yes. I won't examine them at this time. I want to take my time about it.  
[68]

Mr. AUSTIN.—With that understanding, Mr. Cummings, will you identify that tariff and state what that is?

A. It is Pacific Freight Tariff Bureau Joint and Proportional Freight Tariff No. A, I. C. C. No. 62, including Supplement 2 thereof.

Mr. WESTLAKE.—Hasn't that been introduced in evidence already, Mr. Harwood?

Mr. HARWOOD.—Yes.

Mr. AUSTIN.—Q. Will you refer to the pages of Tariff 1-A which cover the rates from Kennebec and Pasco, and also from the intermediate points to California destinations involved in these cases? I call your attention to pages 8 and 27, 46 and 47.

Mr. HARWOOD.—This is I. C. C. 62, is it, Mr. Austin?

Mr. AUSTIN.—Yes.

A. On page 8 the relevant portion is that noted as Group 9, Northern Pacific Railway, naming Pasco, Washington, Hauser, and Larson, Idaho, and points between, including branch line points, except points on Clearwater Short Line Branch shown in Group 11. (Tr. 61.)



(Testimony of M. A. Cummings.)

WITNESS.—(Continuing.) The effect of that provision is to establish the application of Group 9 rates from Pasco, Washington. Group 9 includes points in Washington and Idaho. That is shown on page 8. (Tr. 62.) Under that tariff the most westerly point from which Group 9 rates applied as to the Northern Pacific was Pasco (62 and 63). The next page of the tariff, page 27, concerns the application of rates; Item 28 thereof provides that southbound proportional rates to intermediate points not named, south of Marysville or Woodland, California, will be the same as shown on pages 47, 48, 49 and pages 58 to 61, inclusive, to the next more distant point to which rates are named (Tr. 63).

Q. Now, will you turn to pages 46 and 47, and comment on those.

A. Page 46, captioned, "Basis for making through rates (except where through rates are provided), between San Francisco [69] and Marysville, and points between, and points on the lines of the Northern Pacific Railway shown in Groups 9 and 11." The rates will be made by adding to the proportional rates shown in Items Nos. 200 to 426, inclusive, pages 47 to 61, inclusive, the rates applying to or from Portland or East Portland, Oregon, published in the tariffs (Supplements thereto and reissues thereof) referred to below.

As to the Northern Pacific Railway local and joint freight tariff No. 1323-A is referred to below.

(Testimony of M. A. Cummings.)

On the opposite page, or page 47, appears item No. 200, which is a statement of the proportional class rates applying between Portland, Oregon, or East Portland, Oregon, to San Francisco and Marysville and points between, which are the rates referred to in the item appearing on page 46. (Tr. 63.)

Referring to the table on page 47, Class C would cover the rates on potatoes. That is the third from the last column on that page. The rate was 16 cen<sup>as</sup> at that time. (Tr. 64.)

Q. Will you turn now to Northern Pacific No. 1323 A?

Mr. AUSTIN.—I now offer this tariff as Defendants' Exhibit "J," that is Northern Pacific Railway Tariff, I. C. C. No. 4383.

(The tariff referred to was thereupon received in evidence as Defendants' Exhibit "J" and is reproduced as "Appendix J" to this bill of exceptions.)

Mr. AUSTIN.—Q. Will you turn to page 6 of that tariff and explain what items on that page have reference to this application for relief.

A. The first item or top item in which Portland, Oregon, is named as a station in Group 1.

WITNESS.—(Continuing.) On page 13 the rates from Kennewick and Pasco and other points of origin, on potatoes or onions, are named to Group 1 points, which includes Portland, as indicated [70] on page 6 of the tariff. Page 14, similar to page 13, names rates from additional points of

(Testimony of M. A. Cummings.)

origin on the Northern Pacific to Portland and Group 1 points. (Tr. 64.)

Page 21, under the caption, "Routing instructions," in ascertaining the rates from Kennewick and Pasco to Portland, for example, it will be observed that opposite the rates named from those stations in an appropriate column appear routes 2, 12 and 16, route 2 via the Northern Pacific Ry. Co., on westbound traffic, which would be traffic from Kennewick to Portland. (Tr. 65.)

Mr. AUSTIN.—I now offer in evidence Southern Pacific Company's Local and Joint Freight Tariff No. 302, I. C. C. 3270. (Tr. 65.)

(Said tariff was thereupon received in evidence as Defendant's Exhibit "K" and is reproduced as "Appendix K" to this bill of exceptions.)

WITNESS.—(Continuing.) Referring to the three tariffs which have been received in evidence: They show that from Pasco to Portland the rate is 14 cents, and is found on page 13 of Northern Pacific Railway Tariff No. 1323-A, I. C. C. No. 4383. It will be observed on referring to that page, under Group 1, the rate is specifically named from Kennewick, but not from Pasco. (Tr. 66.)

Rule No. 1, page 10, intermediate application Northern Pacific Railway points, interstate: On traffic routed via the Northern Pacific Railway direct, the rates as stated herein will apply at intermediate points not having specific rates, except as provided in Rule No. 4, unless a lower rate to or from the same point is arrived at by the use of

(Testimony of M. A. Cummings.)

the distance tariff shown in Rule No. 6, in which event a lower rate so arrived at will apply. [71]

Mr. AUSTIN.—Q. Now, will you show the factor beyond Portland?

A. Beyond Portland the factor is found in Item 200, Pacific Bureau, Joint Proportional Freight Tariff No. 1-A, I. C. C. 62.

Q. What page?

A. Page 47, which shows a rate of 16 cents from Portland and East Portland to San Francisco and certain other designated points in California, on potatoes in carloads when originating at points on the Oregon Railroad & Navigation Company and Northern Pacific Railway in Oregon, Washington, Idaho, in Group 9, as to Northern Pacific Railway traffic.

Q. What rate would that be between San Francisco and Portland? A. 16 cents.

Q. What would be the full combination rate?

A. 30 cents. (Tr. 67.)

Mr. AUSTIN.—Now, will you take the tariff and point out the different items showing the rates from the intermediate points, so-called, in this case, to California points of destination?

Mr. HARWOOD.—What tariff is this witness now referring to?

A. Northern Pacific Railway Company tariff 1323-A, I. C. C. 4383. We will take one point of origin for these shipments, say Toppenish.

Mr. AUSTIN.—What page is that on?

A. Page 13 of the tariff.

(Testimony of M. A. Cummings.)

Q. Is Toppenish in the state of Washington?

A. Yes; to Portland, Oregon, item index No. 334, page 13 of the tariff, a rate of 14 cents, Toppenish to Portland.

Q. Now, explain the rate beyond Portland.

A. The rate beyond Portland, I am now reading from Local and Joint Tariff No. 302, I. C. C. No. 3270. Exhibit "K."

Q. That is a Southern Pacific tariff?

A. Yes, on page 23, naming a rate between San Francisco and Portland on potatoes [72] and onions in straight or mixed carloads, of 25 cents.

Q. Now, the combination of the two rates would be what?     A. 39.

Q. And the difference is?     A. 9. (Tr. 68.)

Mr. AUSTIN.—Is it stipulated, Mr. Harwood, that these tariffs which have been introduced were filed with the Interstate Commerce Commission and in force from the effective date?

Mr. HARWOOD.—I will stipulate that these tariffs, I. C. C. 3270 and I. C. C. 4383 were on file with the Interstate Commerce Commission on or before June 10—the first one, I. C. C. No. 43, was filed with the Interstate Commerce Commission on or before June 10, 1910, and this other one, No. 3270, was filed with the Interstate Commerce Commission on or before August 27, 1910.

Mr. AUSTIN.—That covers only two of the tariffs. Does your stipulation cover I. C. C. 62?

Mr. HARWOOD.—Subject to all of the objections that have been made, it will be stipulated that



(Testimony of M. A. Cummings.)

tariff I. C. C. 62, which has been introduced in evidence, was on file with the Interstate Commerce Commission on and after January 15, 1911. (Tr. 68-69.)

WITNESS.—(Continuing.) Toppenish, as an intermediate point, is representative of the situation from all of the other intermediate points on the main line and mentioned in the complaint. (Tr. 69.)

Q. (By Mr. AUSTIN.) I will ask you to state how the rates are made from these branch line points?

Mr. HARWOOD.—I suppose it will be stipulated, in order to save time, that the rates on the branch line points which are involved here are made by the addition of the local rates from the branch line point to the junction point, plus the rate from the junction or main line point.

Mr. AUSTIN.—Q. Is that the fact?

A. There were through local rates from these branch line points to Portland, Oregon, [73] just as there were through rates from the main line points to Portland, Oregon.

Q. Are these rates shown on the tariffs which are introduced in evidence?

A. In Northern Pacific Railway Tariff 1323-A, I. C. C. No. 4383.

Q. They all appear in those tariffs?

A. Yes. (Tr. 69-70.)

WITNESS.—(Continuing.) On June 21, 1918, the rates in question here were increased 25 per

(Testimony of M. A. Cummings.)  
cent, in pursuance of General Order No. 28, issued by the Director-General of the United States Railroad Administration. A further increase of 25 per cent was made effective August 26, 1920, in pursuance of the opinion of the Commission in *Ex Parte* 74, and a 10 per cent decrease was made effective January 1, 1922, in pursuance of an opinion of the Commission in reduced rates on agricultural products. (Tr. 71.)

Mr. AUSTIN.—*Ex Parte* 74 is reported in 58 I. C. C., page 220. (Tr. 71 and 72.) [74]

#### TESTIMONY OF PLAINTIFF IN REBUTTAL.

##### **Testimony of A. W. Knox, for Plaintiff (In Rebuttal).**

A. W. KNOX was called as a witness for the plaintiff in rebuttal, and, having been first duly sworn, testified as follows:

I have been in the railroad business 25 years. I have been agent on the rail lines and interpreted tariffs, and also read tariffs in order to know how to arrive at proper rates. At the present time I am traffic agent for various shippers. I expert their freight bills to see that proper freight rates are applied. I have been in that business for eight years. (Tr. 72).

Mr. HARWOOD.—This question I am going to ask the witness probably was a question on my direct case, it is something I omitted to put in evidence, and that is, some of these shipments, as has been stated to the Court, were made from branch line

(Testimony of A. W. Knox.)

points, which are points on branch lines a few miles from the main line in the Yakima Valley, and certain overcharges are claimed on these shipments. For instance, in case 16,693, the only branch line point involved is Moxee, and there is, I think, one shipment from Moxee. On page 6, line 18 of the complaint, the shipment of February 8, 1918, is a shipment from Moxee to San Francisco; in fact, all these shipments in the complaint are to San Francisco. The charge paid on this shipment was \$207.63, and the overcharge claimed is \$66.72. I want to use this as an illustration of all other branch line points, as I think it typical of the rest.

Q. How was this overcharge of \$66.72 computed, Mr. Knox?

A. I used my max. rates from Kennewick to Portland, plus the rate from Portland to San Francisco. It was held as a max. at Moxee.

Q. Moxee being intermediate?

A. Being intermediate. (72, 73.) [75]

Cross-examination.

(By Mr. AUSTIN.)

WITNESS.—(Continuing.) I used your tariff, Northern Pacific tariff No. 1323, which I believe names a rate of 14 cents from Kennewick to Portland, plus the Class C rate from Portland to San Francisco of 16 cents. I applied that rate as intermediate at Moxee. (Tr. 73.)

Mr. WESTLAKE.—As I understand it, Moxee is on a branch line off the main line, the junction point being North Yakima.

(Testimony of A. W. Knox.)

Mr. HARWOOD.—That is correct.

WITNESS.—(Continuing.) I held the Kennewick rate as the maximum at Moxee because the latter point was included within the shorter distance, therefore, it was a maximum rate. (Tr. 75.)

Q. (By Mr. WESTLAKE.) How far out on the branch line would you go, Mr. Knox, before you came to a point that was not intermediate?

A. To equal or more distant points.

Q. In other words, you would go out on the branch line, for instance, as far from North Yakima as the distance from North Yakima to Kennewick?

A. To have the shorter distance within a longer, yes.

Q. In other words, you would go out on the branch line far enough so that your mileage on the branch line plus the mileage from the junction point to destination equaled the mileage from the point of origin to the point of destination?

A. To comply strictly with the Fourth Section.

Q. In other words, going to Portland, for instance, Spokane is, say, 200 miles from Pendleton, the junction point on the line going out from Spokane; Huntington is 200 miles east of Pendleton. Now, would you say that a rate from Huntington to Portland would have to be held as the maximum at Spokane?

A. The Fourth Section says on the same line and in the same direction. [76]

Q. But Spokane is on the same line, isn't it?

(Testimony of A. W. Knox.)

A. No, Huntington is down near your Idaho line.

Q. Spokane is on the same railroad as Huntington?

A. It is in a different direction. How could we go down there to identify the rate? You are talking about branch line points now.

Q. Take Moxee, for instance: Is that in the same direction?

A. It is in the same general direction, nine miles on a branch line; it is in the same direction. (Tr. 76.)

Mr. WESTLAKE.—Q. Why didn't you take the local rate from Moxee, for instance, as typical, to the junction point, and add to that the rate from Kennewick to Portland?

A. I did not think it was necessary, inasmuch as it was intermediate.

Q. And you pursued that same line of reasoning in arriving at the alleged overcharge with respect to all branch line points in issue in all of these law cases?

A. Where the difference was small and I considered it immaterial.

Q. I say, as to all of these branch line points, you pursued that method?

A. All of the branch line points that are involved in these cases.

Q. In these four cases?

A. In these four cases. (Tr. 77.)

Mr. HARWOOD.—In this connection, if your Honor please, I was under the impression when I



drew these complaints, that in arriving at the alleged overcharge at these so-called branch line points that the local from the branch line point had been added to the rate from the branch point to the junction point, and I am inclined to think now, after Mr. Westlake's suggestion, that that is the correct way to compute it. I was under the impression when Mr. Knox was on the stand, when he figured these overcharges, that this had been done in these cases, and therefore would ask permission in every instance of each of these four [77] cases to change the amount of the alleged overcharge, make it less, so as to include the local from the branch line to the junction point.

Mr. AUSTIN.—I assume that you will be willing to reduce your attorneys' fees to 25 per cent of the new amount?

Mr. WESTLAKE.—Is that correct?

Mr. HARWOOD.—Certainly. (Tr. 77 and 78.)

Mr. HARWOOD.—I have asked, without any amendment, to put that in evidence after we compute it, just what the overcharge would be. We are computing it from Kennewick to San Francisco, but we are not taking into consideration the movement from the junction point to the branch line point. I want to compute it now as the rate from the junction point plus whatever the local rate was from the junction point, whatever it may be, reducing the amount of the alleged overcharge in these cases by the amount of the charge for the local

(Testimony of A. W. Knox.)

movement from the junction point to the branch line point. (Tr. 78, 79.)

### TESTIMONY FOR THE PLAINTIFFS.

#### **Testimony of A. W. Knox, for Plaintiffs (Recalled).**

A. W. KNOX was thereupon recalled for plaintiffs, and testified as follows:

WITNESS.—The local rate from Kennewick to the junction point, North Yakima, was 5 cents a hundred at the time these shipments moved. (79.)

Mr. WESTLAKE.—Some of them moved before the increase, and some of them moved after the increase, and some moved after the reduction. Would 5 cents be the maximum?

Mr. HARWOOD.—I don't know what is in the tariff.

Mr. WESTLAKE.—What is the date of that tariff?

A. November 25, 1919. No, that would not be. If that tariff names 5 cents, that is the proportional rate. We will [78] say 5½ cents would cover it; that would be the maximum Class C rate from 15 to 20 miles.

Q. Is there any minimum?

A. 5 miles or less is 4 cents, according to this tariff, 4 cents a hundred.

The COURT.—When was the rate made?

A. It was November 25, 1919.

Q. Was that before or after the increase?

A. That was after the first increase. (Tr. 79, 80.)

(Testimony of A. W. Knox.)

WITNESS.—(Continuing.) The Kennewick rate on January 12, 1918, was 30 cents per hundred pounds to San Francisco. The rate charged on that date from Sunnyside to San Francisco was 39 cents per 100 pounds. The rate charged on that date from North Yakima to San Francisco would be 39 cents a hundred. The rate from Wesley Junction to San Francisco would be the same. (Tr. 80.) The rate from Cowiche Junction to San Francisco would be 39 cents. The rate charged from Sunnyside to San Francisco was 39 cents. (Tr. 80, 81.)

(It was stipulated between counsel for the respective parties that Yethnot, Farron, Harrah and Ashue are on the Simcoe Branch and the junction point is Wesley Junction, also that Moxee is on a branch line starting from North Yakima, that is, North Yakima is the junction point. With reference to Cowiche, the junction point is Cowiche Junction. That Cowiche Junction is itself on a branch line and the junction point is North Yakima; that Midvale is on the O. W. R. & N. R. R. and not on the Northern Pacific (Tr. 81). That Kennewick is on the west side of the Columbia River, and that Pasco is on the east side of the Columbia River and that they are 2.7 or 3 miles apart and on the same line (Tr. 81, 82). It was also stipulated that the distance from Kennewick to North Yakima is 87 miles, and that the distance from Kennewick to Yakima is the same, and that the distance from Kennewick to [79] Wesley Junction is 67 miles. (Tr. 86.) Also that before June 25, 1918, the tariff

rate from Kennewick to the California points of destination, mentioned in the complaint, was 30 cents. (Tr. 87.)

Mr. AUSTIN.—The increases under *Ex Parte* Order 74 went into effect August 25, 1920. The first increase was under General Order 28, which went into effect June 25, 1918.

Mr. HARWOOD.—That will be stipulated to.

The COURT.—What was the June 25, 1918, order.

Mr. AUSTIN.—That is the date when the increases under General Order 28 went into effect.

Mr. HARWOOD.—A general increase of 25 per cent. When was the second increase.

Mr. AUSTIN.—August 26, 1920, under *Ex Parte* Order 74, another 25 per cent.

Mr. HARWOOD.—And on what date did the decrease of 10 per cent go into effect on potatoes?

Mr. AUSTIN.—On these commodities, that decrease became effective January 1, 1922.

The COURT.—And that decrease was 10 per cent.

Mr. AUSTIN.—That decrease was 10 per cent. (Tr. 86, 87.)

Mr. AUSTIN.—Will you add to that, Mr. Harwood, that the same rate obtained from Pasco to those California points?

Mr. HARWOOD.—Subject to the objection that it is immaterial, irrelevant and incompetent, that admission will be made. Will it be stipulated that after the order of June 25, 1918, and between that

date and August 25, 1920, the rate from Kennewick to points of destination was 37½ cents.

Mr. AUSTIN.—That shows for itself. I presume that is correct. I expected a gentleman here from the traffic department who can confirm that. I will stipulate to it subject to my right to correct it if I find it is incorrect.

Mr. HARWOOD.—Will it be further stipulated that after August 25, 1920, and prior to January 1, 1922, the rate from Kennewick to points of destination on potatoes was 46 cents?

Mr. AUSTIN.—Subject to the same right to change that, to correct it, I will make that stipulation.

The COURT.—When did the railroads go back to the owners?

Mr. AUSTIN.—They were returned on March 1, 1920. Federal control extended from January 1, 1918. (Tr. 87, 88.)

(It was also stipulated that on and after January 1, 1922, the rate from Kennewick to California points of destination, mentioned in the complaint, on potatoes was 42 cents (Tr. 88). It was also stipulated that the Commission's decision in *Ex Parte* 74 reported in 58 I. C. C. at pages 220 to 260 could be referred to by the various parties for the purpose of ascertaining the contents of that order (Tr. 88, 89.)

There was thereupon received in evidence General Order No. 28 as Defendants's Exhibit "L," which was reproduced as "Appendix L" to this bill of exceptions. [80]



Mr. AUSTIN.—I offer in evidence this map showing the lines of the Northern Pacific in the State of Washington, from Kennewick and Pasco to Portland, and also showing the line of the Oregon-Washington R. R. & Navigation Company between Pasco and Portland.

Mr. HARWOOD.—As its lines now exist?

Mr. AUSTIN.—Yes.

(Document was here introduced in evidence, marked Defendants' Exhibit "M," copy of which is annexed hereto as "Appendix M.")

Mr. HARWOOD.—Will it be stipulated that the map was introduced by the plaintiffs may be withdrawn?

Mr. AUSTIN.—I have no objection. Will you stipulate that the mileage shown on the statement between the points mentioned here, which is shown in this statement, and that also the distance from Kennewick to Portland over the Oregon-Washington R. R. & Navigation Co. line are as shown in this statement, subject to any verification that you may wish to make? These distances, I may state to the Court, are taken from the distance table, the tariff filed with the Interstate Commerce Commission, known as 6168, for the Northern Pacific.

Mr. HARWOOD.—I do not think the mileage either from the points of shipment to Portland or the fact that the Oregon-Washington Company rate to Kennewick is a shorter distance makes any difference in this case. The defendant is relying upon a supposed order of the Interstate Commerce Commission.

Mr. AUSTIN.—It is material to this extent, that order 3700, which was introduced yesterday, also makes provision for the long line meeting the competition of the shorter line, and that we bring ourselves within that order by showing the difference in distances of the two lines. Of course, the distance from Portland south to points of destination is the same in all cases. The same [81] thing is covered in the Commission's order of October 14, 1910, which was introduced yesterday. I would like to introduce this statement in evidence. Will you stipulate to that, Mr. Harwood?

Mr. HARWOOD.—With one reservation; the distance from Kennewick to Portland by the O. W. R. & N. I am having checked. The other distances I will stipulate to be correct, subject to the objection that they are immaterial, irrelevant and incompetent.

The COURT.—It will be admitted.

(The document was here admitted in evidence, and marked Defendant's Exhibit "N." (Tr. 91 and 92), a copy of which is hereto attached and marked "Appendix N.")

Mr. HARWOOD.—There is no stipulation yet with respect to Kennewick over the O. R. & N.

Mr. AUSTIN.—I ask leave to amend the answer to conform to the proofs in order that we may show the applications and orders that we have introduced here. I do not want to have any questions of insufficiency of the pleading governing the matters that have been tendered here. I will tender

such amendment to-morrow, or maybe this afternoon.

Mr. HARWOOD.—We object to that, your Honor, on the ground that it is too late. The evidence has been introduced. The trial is practically completed now, and it has proceeded upon the answer as filed, which was amended on the day the trial commenced. We object to any further amendment.

The COURT.—If it conforms to the proof, the Court will deem it amended. (Tr. 92 and 93.)  
[82]

Thereupon, and on the 14th day of August, 1923, said Court made and entered findings of fact and conclusions of law thereon in each of said causes, and upon said findings of fact and conclusions of law, and on said 14th day of August, 1923, judgments were respectively entered against the said defendants and in favor of the said plaintiffs, as follows:

In action No. 16741, for the sum of \$3,485.96, with interest, an attorney fee of \$600, and costs; in action No. 16746 for the sum of \$7,198.95, with interest, an attorney fee of \$1,100, and costs, and in action No. 16694, for the sum of \$2,393.50, with interest, an attorney fee of \$500, and costs. Within the time allowed by law this bill of exceptions was served on counsel for plaintiffs and was filed herein.

WHEREUPON, the Court being willing to preserve the record in order that its rulings may be reviewed for error, if any there be, hereby certifies

that the foregoing bill of exceptions contains all of the evidence offered or admitted upon the trial of said causes, together with the rulings of the Court thereon and the rulings of the Court given, admitting or excluding testimony at said trial and the exceptions taken to the rulings of the Court, and the exceptions allowed thereon.

IT IS FURTHER CERTIFIED that Defendants' Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J" and "K," admitted in said causes, are appended hereto and made a part of the foregoing bill of exceptions.

**Order Settling the Foregoing Bill of Exceptions.**

WHEREUPON, said bill of exceptions is hereby settled, certified and signed, this 26 day of December, 1923, as correct in all respects and presented in due time.

(Sgd.) BOURQUIN,  
United States District Judge. [83]

**Stipulation Re Settlement, etc., of Bill of Exceptions.**

IT IS HEREBY STIPULATED between counsel for the parties to the above-entitled actions that the foregoing bill of exceptions as tendered to said Court by the defendants may by said Court be settled, allowed, certified and signed without amendment.

Dated: San Francisco, Cal., this 13th day of December, 1923.

ALFRED J. HARWOOD,  
Attorney for Plaintiffs.  
HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAS. E. LYONS,  
Attorneys for Defendants. [84]

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(Title of Court and Cause—No. 16741.)

**Petition for Writ of Error.**

To the Honorable JOHN S. PARTRIDGE, Presiding Judge of the Above-entitled Court, and to the Judge or Judges of said District Court:

Now come the above-named defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, by Henley C. Booth, Elmer Westlake, and James E. Lyons, their attorneys, and say:

That on the 14th day of August, 1923, this Court entered a judgment herein, in favor of plaintiff and against defendants, in which judgment and proceedings prior thereunto in this cause certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors, which is filed with this petition;

WHEREFORE, defendants pray that a writ of error may issue in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit for



the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the United States [115] Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, Cal., this 14th day of December, 1923.

HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,  
Attorneys for Defendants.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [116]

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(Title of Court and Cause—No. 16741.)

### **Assignment of Errors.**

Now come the Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the defendants in the above numbered and entitled cause, and in connection with their petition for a writ of error herein, assign the following errors, which they aver were committed by the Court upon the trial of this case and in the rendition of the judgment against the said defendants, appearing upon the record herein, to wit:

(1) The Court erred in overruling and in not sustaining the defendants' demurrer to the original complaint filed in this cause, and in holding that plaintiff was not bound to first seek relief from the

Interstate Commerce Commission before applying to the District Court.

(2) The Court erred in overruling the defendants' motion for a nonsuit.

(3) The Court erred in holding and finding that plaintiff "is entitled to recover the difference between said alleged overcharge and the charge then made by defendant, Northern Pacific Railway Company, for the haul from said station of Harrah to said main line; that the amount of the overcharge on shipments from said [117] station of Harrah is as follows: In the shipment in car No. IC 68852 the amount of the overcharge was and is the sum of \$54.77 instead of the sum of \$79.09 as stated in the complaint. In the case of the shipment in car No. LV 35944 the amount of the overcharge was and is the sum of \$52.24 instead of \$77.38 as stated in the complaint. In the shipment in car No. Erie 61092 the amount of the overcharge was and is the sum of \$49.90 instead of the sum of \$73.92 as stated in the complaint. In the shipment in car No. CGW 30409 the amount of the overcharge was and is the sum of \$50.15 instead of \$74.26 as stated in the complaint. In the shipment in car No. NP 95388, the amount of the overcharge was and is the sum of \$51.12 instead of the sum of \$75.04 as stated in the complaint."

(4) The Court erred in holding and finding: "That for all practical rate-making purposes said station of Harrah is intermediate between Kennewick and Portland, and also between Kennewick and the stations of delivery."

(5) The Court erred in holding and finding: "That plaintiff has been damaged by the payment of the freight charges mentioned in the complaint; that plaintiff has been damaged by the amount of the overcharges as hereinabove found, plus the interest on each overcharge at the rate of seven per cent (7%) per annum, from the date of the payment thereof to the date of judgment herein."

(6) The Court erred in holding and deciding that: "Whether or not defendants' application to be relieved from Section 4 was in proper form and time, it affords no protection in respect to the violations of Section 4 involved in the charges herein. These violations were by reason of rates initiated subsequent to the amendment of 1910, and not within the latter's continuance of rates 'lawfully existing at the time of the passage of this Act' until applications made to continue them were by the Commission determined. [118] They were only within that provision of Section 4 which provided that application for relief could be made and granted in 'special cases after investigation.' That is, rates to be thus granted or authorized, but which could not be legally charged until thus granted or authorized."

(7) The Court erred in holding and deciding that the defendants' applications to be relieved from the provisions of the 4th Section of the Interstate Commerce Act introduced in evidence herein afforded no protection in respect to the alleged violations of Section 4 of said act, involved in the complaint herein.

(8) The Court erred in holding and deciding that the 4th Section orders of the Interstate Commerce Commission introduced in evidence herein, were made without authority and are void in so far as they authorize the alleged departures from the provisions of the 4th Section of the Interstate Commerce Act, complained of in this action.

(9) The Court erred in finding and holding that plaintiffs are entitled to judgment for the sum of Six Hundred (\$600.00) Dollars, or any other sum as attorney's and counsel fees herein.

(10) The Court erred in holding and deciding that the separate defenses pleaded in the defendants' answer to the complaint and the amendments thereto and in the amendments made to conform to the proof do not constitute a full and complete defense to this action.

(11) The Court erred in not rendering judgment on its findings in favor of defendants and against the plaintiff.

WHEREFORE, the said defendants pray that the judgment of the District Court may be reversed.

Dated: San Francisco, Cal., this 14th day of December, 1923.

HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,  
Attorneys for Defendants.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[119]

(Title of Court and Cause—No. 16741.)

**Order Allowing Writ of Error.**

On this 2d day of January, 1924, came the above-named Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the defendants herein, by Henley C. Booth, Elmer Westlake and James E. Lyons, their attorneys, and filed herein and presented to this Court, their petition praying for the allowance of a writ of error and the assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

And the said parties having filed herein a stipulation in writing waiving bond for costs and a supersedeas bond,

On consideration whereof, this Court does hereby allow the writ of error and orders that said writ of error issue without requiring the filing of any bond.

Dated: San Francisco, Cal., this 2d day of January, 1924.

FRANK H. RUDKIN,  
United States Circuit Judge.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.



(Title of Court and Cause—No. 16741.)

**Stipulation and Order Waiving Bonds on Allowance of Writ of Error.**

IT IS HEREBY STIPULATED that a writ of error may be allowed and granted upon defendants' petition therefor without the filing of any supersedeas bond or bond for costs, and that supersedeas and costs bond is hereby waived.

Dated: San Francisco, Cal., this 14th day of December, 1923.

ALFRED J. HARWOOD,  
Attorney for Plaintiff.  
HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,  
Attorneys for Defendants.

So ordered.

FRANK H. RUDKIN,  
United States Circuit Judge.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[121]

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(Title of Court and Cause—No. 16741.)

**Praeipie for Transcript of Record.**

To the Honorable WALTER B. MALING, Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit

Court of Appeals for the Ninth Circuit, pursuant to a writ of error allowed in the above-entitled cause, and to include in such transcript the following papers, to wit:

1. Complaint.
2. Answer of defendants.
3. Trial stipulation, filed March 12, 1923.
4. Minute order, March 12, 1923, allowing amendment to answer.
5. Amendment to answer.
6. Minute order, March 12, 1923, denying defendants' motion for nonsuit.
7. Memorandum decision, filed June 18, 1923, ordering judgment for plaintiff.
8. Findings of fact and conclusions of law.
9. Judgment order.
10. Stipulation and order for single bill of exceptions in cases Nos. 16,741, 16,746, and 16,694.  
[122]
11. All stipulations and orders extending time to serve and tender defendants' bill of exceptions.
12. Bill of exceptions.
13. Stipulation and order waiving bonds on allowance of writ of error.
14. Petition for writ of error.
15. Assignment of errors.
16. Order allowing writ of error.
17. Writ of error.
18. Citation on writ of error.
19. This praecipe.
20. Clerk's certificate to transcript.

Dated: San Francisco, California, this 3d day of January, 1924.

HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,  
Attorneys for Defendants.

[Endorsed]: Filed Jan. 14, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [123]

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(Title of Court and Cause—No. 16694—At Law.)

### **Complaint.**

Now come Joseph Moyse and A. P. Jacobs, co-partners doing business under the firm name and style of <sub>o</sub> Jacobs, Malcolm & Burtt, and residents in the city and county of San Francisco, State of California, in the Southern Division of the Northern District of California, and complain of the defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, and for cause of action allege:

#### I.

That each of said plaintiffs is, and at all times herein mentioned was, a resident of said city and county of San Francisco, in the Northern District of California. That at all times during the year 1917 and at all times during the year 1918, to and including the 22d day of December, 1918, Jacobs, Malcolm & Burtt was a corporation duly organized and existing under and by virtue of the laws of the State of California. That at all times mentioned in

this complaint since the 1st day of November, 1918, said Joseph Moyse and A. P. Jacobs were, and now are, copartners doing business under the firm name and style of Jacobs, Malcolm & Burtt. That on the 15th day of November, 1918, said Jacobs, Malcolm & Burtt, a corporation, duly assigned to said copartnership all claims and demands of said corporation against the defendants, arising out of overcharges by said defendants, or either of them, on the shipments of potatoes [124] made during the year 1917, as alleged in paragraph V of this complaint.

## II.

That the defendant Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Minnesota; that the defendant Southern Pacific Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that at all times herein mentioned each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one state or territory of the United States to other states and territories thereof; that each of said defendants is, and at all times herein mentioned was, subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," as amended.

## III.

That said defendant Northern Pacific Railway

Company operates and at all times herein mentioned operated a railroad from the station of Kennewick, in the State of Washington, to the city of Portland, in the State of Oregon. That said defendant Southern Pacific Company operates and at all times herein mentioned operated a railroad from the city of Portland to San Francisco, Oakland, Stockton and San Jose, in the State of California (hereinafter called said points of delivery). That said railroad, from the said station of Kennewick to the said city of Portland, passes through the stations of Yethanot, Moxee, Wapato, Toppenish, Mabton, Yakima, Sunnyside, Nass, Satus, Farron, Outlook, Zillah, Harrah, Ashue and Cowiche, which said stations are hereinafter called said intermediate stations. That all of said intermediate stations are in the State of Washington.

#### IV.

That prior to the year 1917, said defendants established a through route and joint rate on potatoes from said station of Kennewick to said points of delivery, which said through route and joint rate so established by defendants was in [125] effect during and at the times that all the shipments described in paragraph V of this complaint moved. That said through route from said station of Kennewick to said points of delivery passes through said intermediate stations. That said railroad and said joint route from said station of Kennewick to said points of delivery passes through said intermediate stations. That it is a less distance from said intermediate stations, and each of them, to said



points of delivery than it is from said station of Kennewick to said points of delivery. That it is a longer distance from said station of Kennewick over the same line and route in the same direction to said points of delivery than it is from said intermediate stations to said points of delivery, the shorter being included within the longer distance.

## V.

That between the 13th day of January, 1917, and the 18th day of February, 1922, viz., on the dates hereinafter stated in this paragraph of this complaint, said Jacobs, Malcom & Burttt caused to be shipped and transported over the lines of the defendants, Northern Pacific Railway Company and Southern Pacific Company, from said intermediate stations to said points of delivery, fifty-one carloads of potatoes; that said fifty-one carloads of potatoes were all transported from said intermediate stations to the said points of delivery.

That upon arrival of said shipments at said points of delivery, the defendants demanded that said Jacobs, Malcom & Burttt pay for the transportation thereof charges in excess of the charges then made by defendants for the transportation of the same quantity and of like kind of property for a longer distance over the same line in the same direction, the shorter being included within the longer distance; that is to say, the defendants demanded that said Jacobs, Malcolm & Burttt pay for the transportation of said potatoes charges greater than said defendants then charged for the transportation of potatoes from the said station of Kennewick to

the said points of delivery. That said Jacobs, Malcolm & Burtt thereupon paid said charges so demanded by defendants, which said charges so paid by said [126] Jacobs, Malcolm & Burtt were greater than the compensation then charged by defendants for the transportation of like kind of property for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

That the following statement shows the date of shipment of each carload, the number of the car in which it was shipped, the station from which the shipment was made, the place of destination of each shipment, the amount of the charges paid by said Jacobs, Malcolm & Burtt for the transportation thereof, the date that said charges were paid, and the amount by which the charges so paid exceeded the charges then made for the transportation of the same quantity of like kind of property for the greater distance, as aforesaid, which said last-mentioned amount appears under the head "Overcharge" in the following statement: [127]

114 *Northern Pacific Railway Company et al.*

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
Jan. 14, 1917	CBQ-38610	Moxee	San Francisco	\$147.20	Feb. 6, 1917	\$39.20
Sept. 14, 1917	NP-96773	Yethanot	San Francisco	\$136.50	Sept. 22, 1917	\$39.00
Oct. 2, 1917	NP-98630	Wapato	San Francisco	\$120.86	Oct. 16, 1917	\$27.89
Oct. 2, 1917	NP-98246	Wapato	San Francisco	\$120.86	Oct. 16, 1917	\$27.89
Oct. 20, 1917	NP-96507	Toppenish	San Francisco	\$134.98	Nov. 14, 1917	\$31.15
Dec. 12, 1917	NP-95816	Mabton	San Francisco	\$175.71	Dec. 28, 1917	\$40.56
Mar. 26, 1920	NP-96203	Yakima	San Francisco	\$178.95	Apr. 4, 1920	\$42.00
Apr. 5, 1920	B&O-14161	Sunnyside	San Francisco	\$147.15	Apr. 26, 1920	\$34.54
Apr. 5, 1920	Erie-66988	Sunnyside	San Francisco	\$147.49	Apr. 5, 1920	\$34.60
Mar. 24, 1921	NP-94946	Mabton	San Francisco	\$223.40	Apr. 11, 1921	\$52.20
Mar. 31, 1921	NP-94838	Nass	San Francisco	\$255.56	Apr. 21, 1921	\$63.21
Apr. 14, 1921	NP-97909	Wapato	San Francisco	\$284.13	Apr. 29, 1921	\$66.99
June 1, 1921	CBQ-36644	Wapato	San Francisco	\$265.86	June 13, 1921	\$62.68
Dec. 9, 1921	SLSF-1793	Wapato	San Francisco	\$235.67	Dec. 22, 1921	\$55.57
Sept. 30, 1921	NP-94920	Satus	San Francisco	\$214.94	Sept. 30, 1921	\$55.80
Oct. 3, 1921	NP-94980	Satus	San Francisco	\$225.34	Oct. 17, 1921	\$53.04
Oct. 3, 1921	NP-94693	Satus	San Francisco	\$237.76	Oct. 9, 1921	\$56.06

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
Oct. 4, 1921	NP-96952	Toppenish	San Francisco	\$232.59	Oct. 9, 1921	\$61.18
Oct. 4, 1921	B&O-15667	Toppenish	San Francisco	\$224.17	Oct. 20, 1921	\$53.86
Oct. 5, 1921	NP-96552	Toppenish	San Francisco	\$256.89	Oct. 20, 1921	\$60.58
Oct. 12, 1921	NP-38575	Farron	San Francisco	\$201.87	Oct. 31, 1921	\$60.25
Oct. 15, 1921	NP-94910	Outlook	Oakland	\$329.15	Oct. 31, 1921	\$78.61
Oct. 24, 1921	NP-97806	Zillah	San Francisco	\$292.32	Nov. 4, 1921	\$64.71
Oct. 31, 1921	DLW-6647	Toppenish	San Francisco	\$255.89	Nov. 21, 1921	\$75.03
Nov. 4, 1921	CBQ-36849	Toppenish	San Francisco	\$220.29	Nov. 14, 1921	\$52.41
Nov. 4, 1921	NP-98410	Toppenish	Oakland	\$223.54	Nov. 25, 1921	\$52.71
Nov. 7, 1921	NYC-155887	Harrah	San Francisco	\$250.25	Nov. 25, 1921	\$74.71
Nov. 8, 1921	PRR-104599	Ashue	San Francisco	\$259.22	Nov. 21, 1921	\$76.02
Nov. 9, 1921	LV-35599	Toppenish	Stockton	\$223.22	Dec. 3, 1921	\$52.66
Nov. 10, 1921	Sou-343012	Cowiche	San Francisco	\$241.13	Nov. 21, 1921	\$70.71
Nov. 29, 1921	SLSF-2156	Sunnyside	Oakland	\$221.40	Dec. 23, 1921	\$52.20
Nov. 9, 1921	Erie-61425	Harrah	Oakland	\$241.20	Dec. 1, 1921	\$72.00
Nov. 5, 1921	NP-98744	Toppenish	San Francisco	\$237.02	Nov. 25, 1921	\$55.88
Dec. 2, 1921	NP-97870	Wapato	San Francisco	\$221.10	Dec. 19, 1921	\$51.90
Dec. 6, 1921	SLSF-1947	Toppenish	San Francisco	\$228.52	Dec. 22, 1921	\$53.69



Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
Dec. 10, 1921	CBQ-38075	Wapato	San Francisco	\$221.30	Dec. 30, 1921	\$52.10
Dec. 2, 1921	NP-97583	Wapato	San Jose	\$229.70	Dec. 22, 1921	\$54.16
Jan. 7, 1922	NP-95550	Wapato	San Francisco	\$220.74	Jan. 20, 1922	\$48.83
Jan. 9, 1922	NYC-145625	Yakima	Oakland	\$206.99	Feb. 1, 1922	\$50.37
Jan. 11, 1922	NP-95109	Toppenish	San Francisco	\$200.58	Jan. 20, 1922	\$52.79
Jan. 11, 1922	NP-95176	Toppenish	San Francisco	\$202.76	Jan. 24, 1922	\$49.33
Jan. 14, 1922	NP-95172	Toppenish	San Francisco	\$203.10	Jan. 31, 1922	\$49.41
Jan. 21, 1922	PI-608457	Toppenish	San Francisco	\$201.50	Feb. 3, 1922	\$49.00
Jan. 21, 1922	NP-95490	Toppenish	San Francisco	\$199.87	Feb. 10, 1922	\$48.54
Jan. 24, 1922	NP-98082	Toppenish	San Francisco	\$201.19	Feb. 3, 1922.	\$48.94
Jan. 24, 1922	NP-96247	Toppenish	San Francisco	\$200.53	Feb. 3, 1922	\$48.78
Jan. 24, 1922	NP-96992	Toppenish	San Francisco	\$203.16	Feb. 3, 1922	\$49.34
Jan. 24, 1922	NP-97291	Toppenish	San Francisco	\$202.33	Feb. 7, 1922	\$49.20
Jan. 31, 1922	NP-94524	Toppenish	San Francisco	\$205.13	Feb. 17, 1922	\$49.90
Jan. 30, 1922	NP-94812	Outlook	Stockton	\$259.38	Feb. 14, 1922	\$63.11
Feb. 1, 1922	NP-95292	Toppenish	San Francisco	\$206.11	Feb. 17, 1922	\$50.04



That all of said shipments which were made in the year 1917 were made by said Jacobs, Malcolm & Burtt, a corporation, and the charges paid thereon to defendants were paid by said Jacobs, Malcolm & Burtt, a corporation. That all of said shipments made in the years 1920, 1921 and 1922 were made by said copartnership of Jacobs, Malcolm & Burtt and the charges paid thereon to the defendants were paid by said copartnership.

VI.

That neither of said defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery than from said intermediate stations to said points of delivery. That a lower rate or compensation for the haul from said station of Kennewick to said points of delivery did not exist on the 18th day of June, 1910, the time of the passage of the Act of Congress of June 18, 1910, amendatory to said Act of Congress of February 4, 1887. That the Interstate Commerce Commission never authorized said defendants, or either of them, to charge less from Kennewick to said points of delivery than from said intermediate stations to said points of delivery. [129]

VII.

That at all times between the 31st day of December, 1917, and the 1st day of March, 1920, said railroads of said defendants were in the control and possession of and were used and operated by the President of the United States. That said railroads were so possessed, controlled, used and operated by

the President pursuant to an Act of Congress entitled "An Act making appropriations for the support of the Army." etc., approved August 29, 1916, and pursuant to an Act of Congress approved February 28, 1920.

## VIII.

That neither of said defendants has paid to said Jacobs, Malcolm & Burtt, a corporation, or to the plaintiffs, the amount of said overcharges, or any part thereof, or any interest thereon.

## IX.

That prior to the commencement of this action the plaintiffs filed with the clerk of the county in which the principal place of business of said copartnership is situated, to wit, the city and county of San Francisco, a certificate stating the names in full of all of the members of said partnership, and their places of residence. That prior to the commencement of this action said certificate was published once a week for four successive weeks in a newspaper published in said county. That said certificate so filed and published, as aforesaid, was signed by said partners and acknowledged before an officer authorized to take the acknowledgment of conveyances of real property.

WHEREFORE plaintiffs pray judgment against said defendants for the amount of said overcharges, as alleged in paragraph V, to wit, for the sum of Two Thousand Seven Hundred and Fifteen and  $\frac{33}{100}$  Dollars (\$2,715.33), together with interest on each overcharge at the rate of seven per cent per an-

num from the date of payment thereof. And the plaintiffs also pray judgment for their costs of suit.

ALFRED J. HARWOOD,  
Attorney for Plaintiffs. [130]

State of California,  
City and County of San Francisco,—ss.

A. P. Jacobs, being first duly sworn, deposes and says: That he is one of the plaintiffs above named; that he has read the within and foregoing complaint and knows the contents thereof and that the same is true of his own knowledge.

A. P. JACOBS.

Subscribed and sworn to before me this 27th day of February, 1922.

[Seal] E. M. CLARK,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed:] Filed Feb. 28, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [131]

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(Title of Court and Cause—No. 16694.)

**Answer of Defendants, Northern Pacific Railway  
Company and Southern Pacific Company.**

Now come the defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, and, for answer to the complaint herein, admit, aver and deny as follows, to wit:

I.

Aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer the allegations of paragraph I of said complaint, and, upon that ground, deny each and every, all and singular, the allegations in said paragraph contained.

II.

Deny that the railroad line of defendant Northern Pacific Railway Company, between the station of Kennewick, in the State of Washington, and the city of Portland, in the State of Oregon, passes through the stations of Yethanot, Moxee, Farron, Harrah, Ashue or Cowiche, or any of them, and deny that said stations, or any of them, are intermediate points upon said line of railway between Kennewick and Portland.

III.

Deny that said through route from said station of Kennewick to the said points of delivery named in paragraph III of the complaint, or any of them, passes through said stations of Yethanot, Moxee, Farron, Harrah, Ashue or Cowiche, or any of them; and deny that said railroad or said joint through route from said station of Kennewick to said points of delivery, or any of them, pass through said last-named stations; and deny that said last-named stations, or any of them, are upon the line or route of railroad between said station of Kennewick and said points of delivery.

IV.

Admit, subject to verification, that the plaintiff

and its [132] assignor made the shipments of potatoes between the points described in paragraph V of said complaint and paid freight charges thereon, as alleged in said paragraph.

Defendants aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer the allegations of paragraph V of the complaint with respect to the shipments consigned to, or charges paid by, either the corporation or the partnership known as Jacobs, Malcolm & Burtt, and, upon that ground, deny that all, or any, of said shipments which were made during the year 1917, were made by Jacobs, Malcolm & Burtt, a corporation, or that the charges paid upon said shipments, or any of them, to defendants, or either of them, were paid by said Jacobs, Malcolm & Burtt, a corporation; and deny that all, or any, of said shipments made in the years 1920, 1921, or 1922, or during any part thereof, were made by said copartnership of Jacobs, Malcolm & Burtt, or that the charges paid upon said shipments, or any of them, to the defendants, or either of them, were paid by said copartnership.

#### V.

Deny that neither of defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery, or any of them, than from said intermediate stations, or any of them, to said points of delivery, or any of them.

#### VI.

Aver that they have not sufficient knowledge, in-



formation or belief upon the subject to enable them to answer any of the allegations of paragraph IX of said complaint, and, upon that ground, deny each and every, all and singular, the allegations in said paragraph contained.

#### SECOND SEPARATE DEFENSE.

And for a further and separate answer and defense to said complaint, defendants aver that the stations of Yethanot, Moxee, Farron, Harrah, Ashue and Cowiche, and each of them, are not situated upon the line of defendant Northern Pacific Railway Company passing between the city of Kennewick, in the State of Washington, and the city of Portland, in the State of Oregon, [133] but said stations are, and each of them is, situated upon a branch line of defendant Northern Pacific Railway Company, and that said stations are not, nor is any of said stations, intermediate upon said line of railway of Northern Pacific Railway Company passing between said city of Kennewick and said city of Portland, or between said city of Kennewick and any of the points of destination mentioned in the complaint.

#### THIRD SEPARATE DEFENSE.

And for a further, separate and third answer and defense to said complaint, defendants aver that on or about the 11th day of February, 1911, these defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco,

Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington. That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, intermediate to said California points herein named, and said station of Pasco. That said application has never been cancelled or withdrawn and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission.

#### FOURTH SEPARATE DEFENSE.

For a further, separate and fourth answer and defense to said complaint, defendants aver that neither the plaintiff nor its assignors has, prior to the commencement of this action, or at all, applied to the Interstate Commerce Commission for reparation for on account of the matters and things alleged in said complaint, nor has said Commission ever made an order directing either of the defendants to pay to the plaintiff, or its assignor, any sum whatsoever for or on [134] account of the assessment or collection of freight charges upon any of the shipments alleged in the complaint.

#### FIFTH SEPARATE DEFENSE.

And for a further, separate and fifth answer and defense to said complaint, defendants aver that as to all shipments alleged to have moved, as

described in the complaint, prior to the 28th day of February, 1918, the cause of action attempted to be set forth in the complaint is barred by the provisions of Section 339, Subdivision 1 of the Code of Civil Procedure of the State of California.

#### SIXTH SEPARATE DEFENSE.

And for a further, separate and sixth defense to said complaint defendants aver that as to all shipments alleged in the complaint to have moved prior to the 28th day of February, 1920, the cause of action attempted to be set forth in the complaint is barred by the provisions of Section 339, Subdivision 1 of the Code of Civil Procedure of the State of California.

#### SEVENTH SEPARATE DEFENSE.

And for a further, separate and seventh answer and defense to said complaint, defendants aver that as to any shipments alleged in the complaint to have moved prior to the 31st day of December, 1917 (even excluding the period of federal control, which extended from January 1, 1918, until and including February 29, 1920), the cause of action attempted to set forth in the complaint is barred by the provisions of Section 339, Subdivision 1, of the Code of Civil Procedure of the State of California.

#### EIGHTH SEPARATE DEFENSE.

And for a further, separate and eighth answer and defense to the complaint herein, defendants aver that as to any shipments alleged in the complaint to have moved prior to February 28, 1917, the cause of action attempted to be set forth in the complaint

is barred by the provisions of Section 338, Subdivision 1, of the Code of Civil Procedure of the State of California. [135]

NINTH SEPARATE DEFENSE.

And for a further, separate and ninth answer and defense to said complaint, defendants aver upon information and belief, that neither plaintiff nor its assignors has been damaged by the payment of any of the freight charges mentioned in the complaint.

WHEREFORE, said defendants pray that plaintiff take nothing by its said action and that they may be dismissed hence with their costs.

ELMER WESTLAKE,  
JAMES E. LYONS,  
FRANK B. AUSTIN,  
Attorneys for Defendants.

State of California,  
City and County of San Francisco,—ss.

G. L. King, being first duly sworn, deposes and says, that he is an officer, to wit, assistant secretary of defendant Southern Pacific Company, a corporation, and, as such officer, is duly authorized to and does make this verification for and on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to those matters that he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 28th day of September, 1922.

[Seal] FRANK HARVEY,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Due service of the within answer is admitted this 28th day of September, 1922.

A. J. HARWOOD,  
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 28, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[136]

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(Title of Court and Cause—No. 16,694.)

### **Trial Stipulation.**

It is stipulated that all of the allegations of paragraphs I and IX of the complaint are true and that no evidence thereof need be offered at the trial.

It is further stipulated that the allegations of the complaint denied by the following part of the answers are true and that no evidence thereof need be offered at the trial. The part of said answer referred to is as follows:

“Defendants aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer the allegations of paragraph V of the complaint with respect to the shipments consigned to, or charges paid by, either the corporation or the partnership known as Jacobs, Malcolm & Burt and, upon that ground, deny that all, or



any, of said shipments which were made during the year 1917, were made by Jacobs, Malcolm & Burtt, a corporation, or that the charges paid upon said shipments, or any of them, to defendants, or either of them, were paid by said Jacobs, Malcolm & Burtt, a corporation; and deny that all, or any, of said shipments made in the years 1920, 1921, or 1922, or during any part thereof, were made by said copartnership of Jacobs, Malcolm & Burtt, or that the charges paid upon said shipments, or any of them, to the defendants, or either of them, were paid by said copartnership.

Dated: March 9, 1923.

ALFRED J. HARWOOD,  
Attorney for Plaintiff,  
ELMER WESTLAKE,  
J. E. LYONS,  
FRANK B. AUSTIN,  
Attorneys for Defendants.

So ordered.

R. S. BEAN,  
Judge.

[Endorsed]: Filed Mch. 12, 1923. Walter B. Maling, Clerk. [137]

At a stated term, to wit, the March term, A. D. 1923, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco on Wednesday, the 14th day of March, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this cause.

(Title of Cause—No. 16,694.)

**Minutes of Court—March 14, 1923—Order Allow-  
ing Defendant to File an Amendment to An-  
swer.**

\* \* \* \* \*

Ordered that defendant may file an amendment to answer.

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Defendant moved for a nonsuit on the grounds stated; which motion was submitted after arguments by counsel and being fully considered was denied.

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[138]

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(Title of Court and Cause—No. 16,694.)

**Amendment to Answer.**

Now come the defendants above named, and, by

leave of Court first had and obtained, file this their amendment to their answer hertofore filed herein as follows:

### THIRD SEPARATE DEFENSE.

And for a further, separate and third answer and defense to said complaint, defendants aver that on or about the 11th day of February, 1911, these defendants filed with the Interstate Commerce Commission an application in writing requesting that said commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington.

On or about the third day of February, 1914, the Interstate Commerce Commission duly gave, made and entered its order, known as Fourth Section Order No. 3700, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof.

That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, 2.7 miles west of said station of Pasco and the same is a point on the said line adjacent and in close proximity to said station of Pasco, and is also intermediate to said California points herein named and said station of Pasco. That on or about the 17th

day of May, 1911, the rates on potatoes from Pasco to said California points herein named were extended by said defendants to said station of Kennewick, and ever since that time said rates from Kennewick to said California destinations have been the same as the rates from Pasco to said destinations. [139]

That said application above referred to, which was filed with the Interstate Commerce Commission on or about the 11th day of February, 1911, has never been cancelled or withdrawn, and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission; that said Fourth Section Order No. 3700 has never been vacated, modified or set aside in whole or in part and was in full force and effect during all the times mentioned in the complaint herein and at the time of the movement of each of the shipments therein referred to, except that section 6 thereof has been eliminated.

ELMER WESTLAKE,

J. E. LYONS,

F. B. AUSTIN,

Attorneys for Defendants. [140]

State of California,

City and County of San Francisco,—ss.

G. L. King, being duly sworn, deposes and says: That he is an officer, to wit, assistant secretary of Southern Pacific Company, a corporation, one of the defendants named in the foregoing amendment to answer, and as such officer he is duly authorized to and does make this verification for and on behalf

of said corporation; that he has read the foregoing amendment to answer and knows the contents thereof, and the same is true of his knowledge, except as to the matters which are therein stated on information or belief and as to such matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 14th day of March, 1923.

[Seal] FRANK HARVEY,  
Notary Public in and for the City and County of  
San Francisco, State of California. [141]

**Exhibit "A."**

"The Commission being of the opinion that the convenience of the carriers, the public, and the Commission will be better served by assembling in one general fourth section order, divided into numbered sections for convenient tariff reference, the general fourth section order known as Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12 and experience having suggested certain modifications in the descriptions of conditions under which relief has been afforded by these orders, and certain additional situations as to which carriers may be relieved from the operation of said section, therefore,

"It is ordered, That Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, Gen-



eral No. 11; and Fourth Section Order No. 2200, General No. 12, be and the same are hereby, vacated and set aside as of March 15, 1914.

“It is further ordered, That effective March 15, 1914, as to and confined in all cases to rates and fares which are included in and covered by applications for relief from the provisions of the fourth section of the act to regulate commerce that were filed with the Commission on or before February 17, 1911, and until the applications including and covering such rates or fares have been passed on by the Commission, carriers may file with the Commission, in the manner and form prescribed by law and by the Commissioner’s regulations, such changes in rates and fares as occur in the ordinary course of their business, continuing higher rates or fares at intermediate points, and through rates or fares higher than the combinations of intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not thereby increased. [142]

“It is further ordered, That as to and confined in all cases to rates which are included in and covered by applications as above described, carriers may file with the Commission, in the manner and form prescribed by law and by the Commission’s regulations, changes in rates under the following conditions, although the discrimination against intermediate points is hereby increased.

“Section 1. A through rate which is in excess of the aggregate of the intermediate rates lawfully

published and filed with the Commission may be reduced to equal the sum of the intermediate rates.

“Section 2. Where a through rate has been, or is hereafter, reduced under the authority of section 1 of this order, carriers maintaining through rates via other routes between the same points may meet the rate so made by the route initiating the reduction.

“Section 3. Where a reduction is made in the rate between two points under the authority of section 1 of this order, such reduction may extend to all points in the group which takes the same rates as does the point from or to which the rate has been reduced.

“Sec. 4. Where through rates are in effect which exceed the lowest combination of rates lawfully published and filed with the Commission, carriers may correct said through rates by reducing the same to equal such lowest combination.

“Sec. 5. A longer line or route may reduce the rates in effect between the same points or groups of points to meet the rates of a shorter line or route when the present rates via either line do not conform to the fourth section of the act, under the following circumstances:

(a) Where the longer line is meeting a reduction in rates initiated by the shorter line. [143]

(b) Where the longer line has not at any time heretofore met the rates of the shorter line.

“Sec. 6. A newly constructed line publishing rates from and to its junction points under the authority contained in paragraph (b) of section 5,

may establish from and to its local stations rates in harmony with those established from and to junction points.

“Sec. 7. Carriers whose rates between certain points do not conform to the fourth section of the act, which rates have been made lower than rates at intermediate points to meet the competition of water or rail-and-water carriers between the same points, may make such further reductions in rates as may be required to continue to effectively meet the competition of rail-and-water or all-water lines.

“Sec. 8. Where rates are in effect from or to a point that are lower than rates effective from or to intermediate points, carriers may extend the application of such rates to, or establish rates made with relation thereto at, points on the same line adjacent or in close proximity thereto, provided that no higher rates are maintained from and to points intermediate to the former point and the new point to which the application of the same or relative rates has been extended.

“Sec. 9. Where there is a rate on a commodity from or to one or more points in an established group or points from and to which rates are ordinarily the same, but the rate on the said commodity does not apply at all points in the said group, such rate may be made applicable to or from all of such other points.

“Sec. 10. Where there is a definite and fixed relation between the rates from and to adjacent or contiguous groups of points, and the rates to or from one of said groups are changed, correspond-

ing changes may be made in the rates of the other [144] groups to preserve such relation.

“Sec. 11. In cases where no through rates are in effect via the various routes or gateways between two points, and the combination of lawfully published and filed rates via one gateway makes less than the combination via the other gateway, a through rate may be established on the basis of the combination via the gateway over which the lowest combination can be made, and made applicable via all gateways.

“Sec. 12. In cases where through rates are in effect between two points, via one or more routes or gateways, which are higher than the combination of lawfully published and filed rates via one of these gateways, different carload minima being used on opposite sides of the gateway, a through rate may be established equal to the lowest combination of lawfully published and filed rates, using the higher of the carload minima but continuing the present higher through rate if based upon a lower carload minimum.

“The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the act.

“And it is further ordered, That when the Commission passes upon any application for relief from the provisions of the fourth section with respect to the rates referred to herein, the order issued with relation thereto will automatically cancel the

authority herein granted as to the rates covered and affected by such order.”

[Endorsed]: Filed Mch. 14, 1923. Walter B. Maling, Clerk. [145]

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At a stated term, to wit, the March term, A. D. 1923, of the Southern Division of the United States District Court, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 18th day of June, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable MAURICE T. DOOLING, District Judge.

(Title of Cause—No. 16694.)

**Minutes of Court—June 18, 1923—Order for Judgment.**

In accordance with the decision of the Honorable George M. Bourquin, United States District Judge for the District of Montana (before whom this case was heretofore tried) which said decision is this day filed.

IT IS ORDERED that judgment be entered herein in favor of plaintiff and against the defendants upon special findings to be filed. [146]



(Title of Court and Cause.—No. 16694.)

**Findings of Fact and Conclusions of Law.**

The above-entitled action came duly on for trial on the 14th day of March, 1923, the plaintiffs being represented by Alfred J. Harwood, their attorney, and the defendants by Messrs. Elmer Westlake, James E. Lyons and Frank B. Austin, their attorneys.

Said action was tried on the 14th and 15th days of March, 1923, and was thereupon submitted to the Court for its decision. After due consideration the Court makes and files this its decision, embracing its findings of fact and conclusions of law, as follows:

**I.**

That all of the allegations of subdivisions I, II, IV, VI, VII, VIII and IX of the complaint herein, are true and are sustained by evidence.

**II.**

That all of the allegations of subdivisions III and V of the complaint, are true and are sustained by the evidence except as otherwise specifically found by finding of fact number IV, but except as otherwise specifically found in finding of fact number IV, all of the allegations of subdivisions III and V of the complaint are true and are sustained by the evidence.

**III.**

That the reasonable sum to be allowed plaintiffs, for and as attorney's and counsel fees herein, is the sum of five hundred (\$500.00) dollars, which

said sum is hereby taxed as part of the costs of the case.

IV.

That the stations, Yethanot, Moxee, Farron, Harrah, Ashue and Cowiche, mentioned and described in Subdivisions III and V of the complaint are not on the main line of the defendant, [147] Northern Pacific Railway Company, between Kennewick and Portland, but are on short branch or spur lines which connect with said main line between Kennewick and Portland; that said stations are distant from the main line as follows, viz.:

Name of Station	Distance from Main Line in Miles.
Yethanot .....	2.2
Moxee .....	9.0
Farron .....	8.1
Harrah .....	9.5
Ashue .....	5.2
Cowiche .....	9.2

that the points from which said branch lines to said stations above mentioned diverge from the said main line, are all more than 67 miles west of Kennewick, and are all intermediate between Kennewick and Portland. That in case of shipments from said stations, the plaintiffs are not entitled to recover the full amount of the alleged overcharge stated in subdivision V of the complaint, but are entitled to recover the difference between said alleged overcharge and the charge then made by defendant, Northern Pacific Railway Company, for the haul from said stations re-

spectively to said main line; that the amount of the overcharge on shipments from said stations is as follows: In shipment from Moxee in car number CBQ 38610, the amount of the overcharge was and is the sum of \$26.14 instead of the sum of \$39.20 as stated in the complaint. In the case of the shipment from Yethanot in car No. NP 96773, the amount of the overcharge was and is the sum of \$26.00 instead of \$39.00 as stated in the complaint. In the shipment from Farron in car No. NP 38575, the amount of the overcharge was and is the sum of \$40.67 instead of the sum of \$60.25 as stated in the complaint. In the shipment from Harrah in car No. NYC 155897 the amount of the overcharge was and is the sum of \$50.44 instead of \$74.71 as stated in the complaint. In the shipment from Ashue in car No. PRR 104599, the amount of the overcharge was and is the sum of \$50.69 instead of the sum of \$76.02 as stated in the complaint. In the shipment from Kowiche in car No. Sou-343012 the amount [148] of the overcharge was and is the sum of \$47.15 instead of the sum of \$70.71 as stated in the complaint. In the shipment from Harrah in car No. Erie 61425, the amount of the overcharge was and is the sum of \$48.60 instead of the sum of \$72.00 as stated in the complaint. That for all practical rate-making purposes said stations mentioned in this finding are intermediate between Kennewick and Portland, and also between Kennewick and the stations of delivery.

V.

With relation to the second separate defense set

up in defendant's answer, the Court finds as follows: that the stations mentioned in said separate defense are not on the line of the Northern Pacific Railway Company passing between Portland and Kennewick, but are on short branch lines which diverge from said main line, as more specifically appears in finding of fact IV; that for all practical rate-making purposes said stations are intermediate between Kennewick and Portland, and between Kennewick and the points of destination mentioned in the complaint.

#### VI.

That on October 14, 1910, the Interstate Commerce Commission made an order in the words and figures set forth in Exhibit "A," attached to and made a part of these findings; that on December 16, 1910, the defendants filed with the Interstate Commerce Commission a so-called application for relief from the provisions of the fourth section of the Interstate Commerce Act, a copy of which said so-called application is marked Exhibit "B" and made a part of these findings; that on December 16, 1910, said defendants filed with the Interstate Commerce a so-called application for relief from the provisions of the fourth section of the Interstate Commerce Act, a copy of which said so-called application is marked Exhibit "C," and made a part of these findings.

That on or about the 11th day of February, 1911, the defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission to [149] authorize and



permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington: that a copy of said application is annexed to and made a part of these findings and marked Exhibit "D."

That on or about February 3d, 1914, the Interstate Commerce Commission made and entered an order denominated, "Fourth Section Order No. 3700"; that the copy of said order, marked Exhibit "A," and attached to the amendment to the answer of the defendants, is a true copy of said order, except that before the part of the said order set forth in said Exhibit "A" the following occurs, viz.: "In the matter of permitting ordinary changes in rates pending action upon applications for relief from the provisions of the Fourth Section of the Act to Regulate Commerce as amended June 18, 1910." That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, three miles west of said station of Pasco and is also intermediate to said California points named in the complaint, and said station of Pasco. That on or about the 17th day of May, 1911, the rates on potatoes from Pasco to said California points herein named were extended by said defendants to



said station of Kennewick, and ever since that time said rates from Kennewick to said California destinations have been the same as the rates from Pasco to said destinations; that said station of Pasco is on the east side and said station of Kennewick is on the west side of the Columbia River.

That said application above referred to, which was filed with the Interstate Commerce Commission on or about the 11th day of February, 1911, has never been cancelled or withdrawn, and the same has never been granted or refused or acted [150] upon, either wholly or in part, by the Interstate Commerce Commission; that said Fourth Section Order No. 3700 has never been vacated, modified or set aside in whole or in part, except that Section 6 thereof has been eliminated.

#### VII.

That the allegations of the alleged fourth separate defense pleaded in the answer of the defendants are true and are sustained by the evidence.

#### VIII.

That the allegations of the alleged fifth separate defense pleaded in the said answer are not true and are not sustained by the evidence; that as to all shipments alleged to have moved as described in the complaint, prior to February 28th, 1918, the cause of action is not barred by the provisions of section 339, subdivision one of the Code of Civil Procedure of the State of California.

#### IX.

That the allegations of the alleged sixth separate

defense pleaded in said answer are not true and are not sustained by the evidence; that as to all shipments alleged in the complaint to have moved prior to the 28th day of February, 1920, the cause of action is not barred by the provisions of section 339, subdivision one, of the Code of Civil Procedure of the State of California.

X.

That the allegations of the alleged seventh separate defense pleaded in said answer, are not true and are not sustained by the evidence; that as to any shipments alleged in the complaint to have moved prior to the 31st day of December, 1917 (even excluding the period of federal control which extended from January 1, 1918, until and including February 29, 1920), the cause of action set forth in the complaint is not barred by provision of section 339, subdivision one of the Code of Civil Procedure of the State of California.

XI.

That the causes of action based on the six shipments [151] first described in the schedule set forth in subdivision V of the complaint are barred by the provisions of Section 16 of the Interstate Commerce Act.

XII.

That plaintiffs and their assignors have been damaged by the payment of the freight charges mentioned in the complaint; that with the exception of the causes of action which are barred as found in finding of fact XI, the plaintiffs and their assignors have been damaged by the amount of the

overcharges as hereinabove found, plus the interest on each overcharge at the rate of seven per cent (7%) per annum, from the date of the payment thereof to the date of judgment herein.

#### CONCLUSIONS OF LAW.

As conclusions of law from the foregoing findings of fact the Court finds:

##### I.

That plaintiffs are entitled to judgment against defendants for the sum of two thousand three hundred ninety-three dollars and fifty cents (\$2,393.50), being the total amount of the overcharges collected by defendants, except the overcharges the causes of action to recover which are barred by limitation as found in finding XI, together with interest on each separate overcharge at the rate of seven per cent (7%) per annum from the date of the payment thereof as alleged in the complaint to the date of judgment; that the total amount of said interest to the 1st day of July, 1923, is the sum of two hundred eighty-two dollars and twelve cents (\$282.12); that the interest on said overcharges amounts to the sum of forty-six (\$.46) cents per day.

##### II.

That plaintiffs are entitled to judgment for the sum of five hundred (\$500.00) dollars as attorney's and counsel fees herein, which said sum shall be taxed as part of the costs of the case.

##### III.

That plaintiffs are entitled to judgment for their cost of suit. [152]

Let judgment be entered accordingly.

Dated this 7 day of Aug. 1923.

BOURQUIN,  
District Judge. [153]

**Exhibit "A."**

INTERSTATE COMMERCE COMMISSION.  
ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of October, A. D. 1910. Present: MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, FRANCIS M. COCKRELL, FRANKLIN K. LANE, EDGAR E. CLARK, JAMES S. HARLAN, Commissioners.

IN THE MATTER OF APPLICATION FOR RELIEF UNDER THE FOURTH SECTION OF THE ACT TO REGULATE COMMERCE, AS AMENDED JUNE 18, 1910.

A public hearing having been had, and it appearing that changes in rates and fares occurring in the ordinary course of business should be possible, pending the time when formal applications to be relieved from the requirements of section 4 of the act to regulate commerce are to be filed by the carrier subject to that act:

IT IS ORDERED: That until February 17, 1911, said carriers may file with the Commission, in manner and form as prescribed by law and by the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the



present rate bases or adjustments, higher rates or fares at intermediate points, and through rates or fares higher than the combination of the intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not made greater than that in existence on August 17, 1910, except when a longer line or route reduces rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the short line. The Commission does not hereby approve any rates or fares that may be filed under this permission, all such rates and fares being subject to complaint, investigation, and correction if they conflict [154] with any other provisions of the act.

IT IS FURTHER ORDERED, That such of said carriers as desire to be relieved from any of the requirements of section 4 of the act shall, on or before February 17, 1911, file with the Commission applications as provided in said section 4 and in form as hereinafter prescribed.

Separate applications shall be made as to freight rates and passenger fares. Separate applications shall also be made for relief under the long-and-short-haul provision and for relief under the prohibition against through rates or fares in excess of the combination of the intermediate rates or fares.

Separate applications should also be made for different situations governed by different rate adjustments or competitive influences.

Such applications must be certified, and where the relief sought is the same for two or more car-



riers in the same territory as to the same traffic application may be made jointly for two or more carriers by a joint agent or attorney, where the rates are contained in a joint tariff a petition from the carrier that issues the tariff, specifying the tariff by I. C. C. number, may be made on behalf of the carriers lawfully parties to the tariff and will be held and considered to be on behalf of all carriers concurring in the tariff.

Application for relief must be made on part of that carrier which actually charges more for the shorter haul than for the longer distance. For example, through rates from C. F. A. territory to the southeast made in combination on the Ohio River crossings. If the roads north of the river do not charge less for a longer distance haul to the river and the roads south of the river do charge more for a shorter haul, the application should be made on behalf of the roads south of the river.

If a joint rate or fare is reasonably less than the combination of the intermediate rates or fares, the carriers accepting divisions of such joint rate or fare will not [155] ordinarily be held to thereby violate the fourth section of the act.

IT IS FURTHER ORDERED, That the Commission reaffirmed its previously expressed view that a through rate or fare that is higher than the combination of the intermediate rates or fares is *prima facie* unreasonable (Rule 56 (b) Tariff Circular 17-A) and will insist upon the application of that principle at the earliest possible date in every in-

stance except possible extreme and very unusual cases.

IT IS FURTHER ORDERED, That applications for relief from the provisions of the fourth section of the act shall be in such of the following forms as meet the conditions as to which such relief is sought:

(a) The — (name of carrier) —, through — (name of officer or agent making application), its — (Official title) —, petitions the Interstate Commerce Commission for authority to establish rates for the transportation of — (name of commodity or description of traffic) — from — (name or description of point or points of origin) to — (name or description of point or points of destination) — lower than rates concurrently in effect to intermediate points — (names or description of intermediate points) — ; the highest charge of such intermediate points to apply at — (name of intermediate point) —, and to be not more than — (cents per 100 pounds, per ton, per car, or per package) — in excess of the rates to — (name of more distant point at which lower rate is proposed) —. This application is based upon the desire of petitioner to meet by direct haul over a longer line or route competitive conditions created at — (name or description of more distant point or points at which lower rates are proposed) — by — (name of railway) —.

NOTE: The points from and to which the lower rates are desired should be stated specifically [156] whenever practicable. If the

applications applied to a situation in which rates or fares from or to a large number of points are based upon, or bear a fixed relation to, the rate or fare from a basing point to the destination in question, it will be sufficient to so state and to give the highest charge proposed from that basing point and the point at which highest charge will apply. If application refers to a particular commodity as to which it is desired to establish commodity rates from points or production or ports of transshipment, leaving higher class rates to apply from intermediate points, that fact should be stated and the producing points or ports should be named. When it is not practicable to name all the points of origin or destination, and they can be accurately described by well-established and familiar names of traffic territories, such descriptions may be used; for example, "From Atlantic seaboard territory as described in — tariff. I. C. C. No. —" or "From C. F. A. territory."

(b) Same form as (a) shall be used except that the reason which is relied upon as justifying the application shall be stated to be desire to meet by direct haul lower rates fixed at the more distant point by competition of water carriers, specifying whether the competition is created by regular line or so-called "tramp" vessels, and if the former, the name of the line or lines.

(c) Application shall be made in the same form as (a), except that the reason relied upon in sup-

port of same shall be stated to be a desire to meet competition at the more distant point created by water carriers or shorter-line railroad, and to base the rates at intermediate points upon the rate to the more distant competitive point plus a local or charge back. The application shall also show whether the charge for the back haul is the full local or a proportional or an arbitrary rate.

(d) Application shall be made in general form the same as (a) [157] but shall request authority to charge a higher rate as the through route than the aggregate of the intermediate rates subject to the provisions of the act. Application shall state clearly the reasons in support thereof, and shall specify the extent to which it is desired to make the through rate higher than the aggregate of the intermediate rates.

The same forms, modified as may be necessary, shall be used for applications relative to passenger fares, whenever it is practicable the application, either as to freight rates or passenger fares, should cite by I. C. C. numbers the tariff or tariffs in which appear the rates, continuance of which is desired, whenever it is practicable to confine the application to definite points of origin and destination, or to one or more named commodities, that should be done, and whenever practicable the rates themselves should be stated. Each carrier may file as many applications as are necessary to properly present the several situations as to which it desires relief, and it is desirable that each particular situation be treated by itself.

A true copy:

(Signed) EDW. A. MOSELEY,  
Secretary. [158]

**Exhibit "B."**

PACIFIC FREIGHT TARIFF BUREAU.

San Francisco, Cal., December 10, 1910.

TO THE INTERSTATE COMMERCE COM-  
MISSION,  
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVI-  
SIONS OF FOURTH SECTION OF  
AMENDED COMMERCE ACT FOR AC-  
COUNT OF PACIFIC FREIGHT TARIFF  
BUREAU JOINT AND PROPORTIONAL  
FREIGHT TARIFF No. 1. I. C. C. No. 2 OF  
F. W. GOMPH, AGENT, WHICH IS ON  
FILE WITH YOUR HONORABLE COM-  
MISSION:

In the name and on behalf of each of the carriers parties to the tariff named above, the undersigned, acting as agent and attorney, or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates shown in above-named tariff, from and to points named, LOWER than rates concurrently in effect to intermediate points through which traffic moves, in Canada, and in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington, and



points in states east thereof, including District of Columbia.

This application is based upon the desire of the interested carriers to continue the present method, basis or principle of making rates lower at the more distant points than at the intermediate points; such lower rates being necessary by reason of—competition of various water carriers operating upon the Atlantic and Pacific Oceans; competition of carriers operating on the Atlantic and Pacific Oceans, partly by water and partly by rail; competition of various water carriers operating coastwise on the Pacific Ocean; and of carriers partly by water (operating coastwise on the Pacific Ocean and upon the rivers of California and Oregon) and partly by rail between Pacific Coast ports and points in the interior; rates established via the shorter or more direct routes, and applied via the longer or more circuitous route or routes; competition between carriers [159] or routes subject to the act to regulate commerce; competition between markets of production and distribution.

A further petition is respectfully made asking for authority to waive that portion of the Fourth Section of the amended act, which provides that the through rate shall not exceed the aggregate of the intermediate rates subject to the provisions of the act, or to permit your petitioner to publish in each of its tariffs a clause as follows:

The aggregate of the local rates (class or commodity) to and from any intermediate point, when

less than the through rates (class or commodity) shown in this tariff, will apply as the through rate.

OR

The charges collected for the transportation of a shipment from and to, or between, points named in this tariff and thereby made a part of this tariff, **MUST NOT EXCEED** what the charges would be by applying thereon the aggregate of the lawful intermediate rates in force via the route over which the shipment moved.

LINE OF A GIVEN RAILROAD, there will be found instances where the aggregate of the intermediate rates will be less than the through rates in that tariff. This condition is almost unavoidable because different bases are used upon different portions of the same line.

F. W. GOMPH,  
Agent.

Subscribed and sworn to before me this tenth (10) day of December, 1910.

PEDRO SAIZ,  
Notary Public in and for the City and County of  
San Francisco, State of California.  
My commission expires May 26, 1914. [160]

**Exhibit "C."**

PACIFIC FREIGHT TARIFF BUREAU.

San Francisco, Cal., December 10, 1910.

To the Interstate Commerce Commission,  
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF PACIFIC FREIGHT TARIFF BUREAU AND PROPORTIONAL FREIGHT TARIFF NUMBER 1-A, I. C. C. No. 62 OF F. W. GOMPH, AGENT, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION.

In the name and on behalf of each of the carriers that are parties to the above-named tariff the undersigned as agent and attorney or under authority of concurrences on file with the Commission from each of said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates shown in the above-named tariffs between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles and other points in California named in said tariff *and* Spokane, Walla Walla, Washington, Pendleton and Baker City, Oregon, and Warden, Osborne, Mullen, Idaho, and other points in Oregon, Washington and Idaho named in said tariff lower than the rates concurrently in effect at intermediate points on the Northern Pacific Railway.

This application is based on the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route, competitive conditions created at Bunn, Burke, Dorn, Gem, Hecla, Larson, Mine, Mullen, Wall and Warden, Idaho by the Oregon Washington Railway and Navigation Co. met by the Northern Pacific via Paradise and St. Regis, Montana, the longer and more circuitous route, but not applicable at intermediate points along that line between Wauser and Larson, Idaho, for the reason that short line competition does not exist at such intermediate points.

It is not practical to state in this petition the [161] rates in detail nor specify the higher charge at intermediate points nor the extent to which rates at the intermediate points exceed the rates at the more distant points named.

F. W. GOMPH,  
Agent.

Subscribed and sworn to before me this 10th day of December, 1910.

P. SAIZ,  
Notary Public in and for the City and County of  
San Francisco, State of California. [162]

Exhibit "D."

PACIFIC FREIGHT TARIFF BUREAU.

San Francisco, Cal., February 11, 1911.

PETITION No. 2.

TO THE INTERSTATE COMMERCE COMMISSION,

Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF TARIFF No. 1-A, I. C. C. No. 62 of F. W. GOMPHERS, AGENT.

In the name and on behalf of each of the carriers parties to the tariff above named, the undersigned, acting as agent and attorney, or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates in above-named tariff, between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles, Cal., and other points in California named in said tariff, *and* Pasco, Wash., lower than the rates to points on the Northern Pacific Railway, intermediate to Pasco, Wash.

This application is based upon the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route competitive conditions created at points directly competitive with Pasco, Wash., such as Wallula and Hunts Junction, Wash.,



by the Oregon-Washington Railroad and Navigation Co.

It is not practicable in this petition to state the rates in detail nor to specify the highest charge at intermediate point, nor the extent to which rates at the intermediate points exceed the rates at the more distant points named above.

F. W. GOMPH,  
Agent.

Subscribed and sworn to before me this 11th day of February, 1911.

P. SAIZ,  
Notary Public in and for the City and County of  
San Francisco, California.

Service and receipt of a copy of the within findings of fact is hereby admitted this 30th day of June, 1923.

ELMER WESTLAKE,  
J. E. LYONS,  
Attorneys for Defendants.

[Endorsed]: Filed August 14, 1923. Walter B. Maling, Clerk. [163]

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(Title of Court and Cause—No. 16694.)

### **Judgment on Findings.**

This cause having come on regularly for trial upon the 14th day of March, 1923, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed; A. J. Harwood, Esq., appearing as attorney for plaintiff

and Frank B. Austin and Elmer Westlake, Esqrs., appearing as attorneys for defendants and the trial having been proceeded with on the 15th day of March, 1923, and oral and documentary evidence having been introduced on behalf of the respective parties and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation having filed its opinion and its findings in writing and order that judgment be entered herein in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Joseph Moyse and A. P. Jacobs, copartners doing business under the firm name and style of Jacobs, Malcolm & Burtt, plaintiffs, do have and recover of and from Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, defendants, the sum of two thousand six hundred ninety-six and 32/100 (\$2,696.32) dollars, together with \$500.00 as attorney's fees and for costs herein expended taxed at \$25.00.

Judgment entered August 14, 1923.

WALTER B. MALING,

Clerk. [164]

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(Title of Court and Cause—No. 16694.)

**Stipulation and Order Extending Time to and Including September 27, 1923, to File Bill of Exceptions.**

It is hereby stipulated that the defendants have until and including September 27th, 1923, in which

to prepare and serve on the plaintiffs a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,  
Attorney for Plaintiffs.  
HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAS. E. LYONS,  
Attorneys for Defendants.

So ordered.

PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Sep. 18, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[165]

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(Title of Court and Cause—No. 16694.)

**Stipulation and Order Extending Time to and Including October 15, 1923, to File Bill of Exceptions.**

It is hereby stipulated that the defendants have until and including October 15, 1923, in which to prepare and serve on the plaintiffs a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,  
Attorney for Plaintiffs.  
HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAS. E. LYONS,  
Attorneys for Defendants.

So ordered.

PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Sep. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[166]

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(Title of Court and Cause—No. 16694.)

**Stipulation and Order Extending Time to and Including October 25, 1923, to File Bill of Exceptions.**

It is hereby stipulated that the defendants have until and including October 25, 1923, in which to prepare and serve on the plaintiffs a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,  
Attorney for Plaintiffs.  
HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAS. E. LYONS,  
Attorneys for Defendants.

So ordered.

PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Oct. 11, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[167]

(Title of Court and Cause—No. 16694.)

**Stipulation and Order Extending Time to and Including November 10, 1923, to File Bill of Exceptions.**

It is hereby stipulated that the defendants have until and including November 10, 1923, in which to prepare and serve on the plaintiffs a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,  
Attorney for Plaintiffs.  
HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAS. E. LYONS,  
Attorneys for Defendants.

So ordered.

PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Oct. 24, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[168]

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(Title of Court and Causes—No. 16694, No. 16741 and No. 16746.)

**Stipulation and Order Extending Time to and Including November 20, 1923, to File Bill of Exceptions.**

IT IS HEREBY AGREED that the defendants in the above-entitled actions be and they are hereby



granted until and including November 20, 1923, in which to prepare, serve and deliver to the Clerk for the Judge the bill of exceptions proposed by said defendants in said cases.

Dated: November 7, 1923.

A. J. HARWOOD,  
Attorney for Each of the Plaintiffs Above  
Named.

J. E. LYONS,  
ELMER WESTLAKE,  
Attorneys for Defendants Above Named.

So ordered.

PARTRIDGE,  
Judge.

[Endorsed]: Filed Nov. 8, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [169]

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(Title of Court and Cause—No. 16694.)

**Petition for Writ of Error.**

To the Honorable JOHN S. PARTRIDGE, Presiding Judge of the Above-entitled Court, and to the Judge or Judges of said District Court:

Now come the above-named defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, by Henley C. Booth, Elmer Westlake and James E. Lyons, their attorneys, and say:

That on the 14th day of August, 1923, this Court entered a judgment herein, in favor of plaintiffs and against defendants, in which judgment and

proceedings prior thereunto in this cause certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors, which is filed with this petition;

WHEREFORE, defendants pray that a writ of error may issue in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the United States [170] Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, Cal., this 14th day of December, 1923.

HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,  
Attorneys for Defendants.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[171]

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(Title of Court and Cause—No. 16,694.)

### **Assignment of Errors.**

Now come the Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the defendants in the above numbered and entitled cause, and in connection with their petition for a writ of error herein, assign the following errors, which they aver were committed by

the Court upon the trial of this case and in the rendition of the judgment against the said defendants appearing upon the record herein, to wit:

(1) The Court erred in overruling and in not sustaining the defendants' demurrer to the original complaint filed in this cause, and in holding that plaintiffs were not bound to first seek relief from the Interstate Commerce Commission before applying to the District Court.

(2) The court erred in overruling the defendants' motion for a nonsuit.

(3) The Court erred in holding and finding that plaintiffs "are entitled to recover the difference between said alleged overcharge and the charge then made by defendant, Northern Pacific Railway Company, for the haul from said stations respectively to said [172] main line; that the amount of the overcharge on shipments from said stations is as follows: In shipments from Moxee in Car Number CBQ 38610, the amount of the overcharge was and is the sum of \$26.14 instead of the sum of \$39.20 as stated in the complaint. In the case of the shipment from Yethanot in Car No. NP 96773, the amount of the overcharge was and is the sum of \$26.00 instead of \$39.00 as stated in the complaint. In the shipment from Farron in Car No. NP 38575, the amount of the overcharge was and is the sum of \$40.67 instead of the sum of \$60.25 as stated in the complaint. In the shipment from Harrah in Car No. NYC 155897 the amount of the overcharge was and is the sum of \$50.44 instead of \$74.71 as stated in the complaint. In the shipment

from Ashue in Car No. PRR 104599, the amount of the overcharge was and is the sum of \$50.69 instead of the sum of \$76.02 as stated in the complaint. In the shipment from Cowiche in Car No. Sou-343012 the amount of the overcharge was and is the sum of \$47.15 instead of the sum of \$70.71 as stated in the complaint. In the shipment from Harrah in Car No. Erie 61425, the amount of the overcharge was and is the sum of \$48.60 instead of the sum of \$72.00 as stated in the complaint.”

(4) The Court erred in holding and finding that for all practical rate-making purposes the stations of Yethanot, Moxee, Farron, Harrah, Ashue and Cowiche are intermediate between Kennewick and Portland, and also between Kennewick and the stations of delivery mentioned in the complaint.

(5) The Court erred in holding and finding: “That plaintiffs and their assignors have been damaged by the payment of the freight charges mentioned in the complaint; that with the exception of the causes of action which are barred as found in finding of fact XI, the plaintiffs and their assignors have been damaged by the amount of the overcharges as hereinabove found, plus the interest on each overcharge at the rate of seven per cent (7%) per annum, from the date of the payment thereof to the date of judgment herein.” [173]

(6) The Court erred in holding and deciding that: “Whether or not defendants’ application to be relieved from Section 4 was in proper form and time, it affords no protection in respect to the violation of Section 4 involved in the charge herein.

These violations were by reason of rates initiated subsequent to the amendment of 1910, and so not within the latter's continuance of rates 'lawfully existing at the time of the passage of this act' until applications made to continue them were by the Commission determined. They were only within that provision of Section 4 which provided that application for relief could be made and granted 'in special cases after investigation.' That is, rates to be thus granted or authorized, but which could not be legally charged until thus granted or authorized."

(7) The Court erred in holding and deciding that the defendants' application to be relieved from the provisions of the 4th Section of the Interstate Commerce Act introduced in evidence herein afforded no protection in respect to the alleged violations of Section 4 of said act, involved in the complaint herein.

(8) The Court erred in holding and deciding that the 4th Section Orders of the Interstate Commerce Commission introduced in evidence herein, were made without authority and are void in so far as they authorize the alleged departure from the provisions of the 4th Section of the Interstate Commerce Act, complained of in this action.

(9) The Court erred in finding and holding that plaintiffs are entitled to judgment for the sum of Five Hundred (500) Dollars or any sum as attorneys' and counsel fees herein.

(10) The Court erred in holding and deciding that the separate defenses pleaded in the defend-



ants' answer to the complaint and the amendments thereto and in the amendments made to conform to the proof do not constitute a full and complete defense to this action. [174]

(11) The Court erred in not rendering judgment on its findings in favor of defendants and against the plaintiffs.

WHEREFORE, the said defendants pray that the judgment of the District Court may be reversed.

Dated: San Francisco, Cal., this 14th day of December, 1923.

HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,  
Attorneys for Defendants.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [175]

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(Title of Court and Cause—No. 16,694.)

**Order Allowing Writ of Error.**

On this 2d day of January, 1924, came the above-named Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the defendants herein, by Henley C. Booth, Elmer Westlake and James E. Lyons, their attorneys, and filed herein and presented to this Court, their petition praying for the allowance of a writ of error and the assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers

upon which the judgment herein was rendered duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

And the said parties having filed herein a stipulation in writing waiving bond for costs and a supersedeas bond,—

On consideration whereof, this Court does hereby allow the writ of error and orders that said writ of error issued without requiring the filing of any bond.

Dated: San Francisco, Cal., this 2d day of January, 1924.

FRANK H. RUDKIN,  
United States Circuit Judge.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[176]

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(Title of Court and Cause—No. 16,694.)

**Stipulation and Order Waiving Bonds on Allowance  
of Writ of Error.**

IT IS HEREBY STIPULATED that a writ of error may be allowed and granted upon defendants' petition therefor without the filing of any supersedeas bond or bond for costs, and that supersedeas and costs bond is hereby waived.

Dated: San Francisco, Cal., this 14th day of December, 1923.

ALFRED J. HARWOOD,  
Attorney for Plaintiff.  
HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,  
Attorneys for Defendants.

So ordered.

FRANK H. RUDKIN,  
United States Circuit Judge.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [177]

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(Title of Court and Cause—No. 16,694.)

**Praeceptum for Transcript of Record.**

To the Honorable WALTER B. MALING, Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to a writ of error allowed in the above-entitled cause, and to include in such transcript the following papers, to wit:

1. Complaint.
2. Answer of defendants.
3. Trial stipulation, filed March 12, 1923.
4. Minute order, March 12, 1923, allowing amendment to answer.
5. Amendment to answer.

6. Minute order, March 12, 1923, denying defendants' motion for nonsuit.
7. Findings of fact and conclusions of law.
8. Judgment order.
9. All stipulations and orders extending time to serve and tender defendants' bill of exceptions.
10. Stipulation and order waiving bonds on allowance of writ of error.
11. Petition for writ of error.
12. Assignment of errors.
13. Order allowing writ of error.
14. Writ of error.
15. Citation on writ of error.
16. This praecipe.
17. Clerk's certificate to transcript.

Please consolidate the transcript in this case with that in suits Nos. 16,741 and 16,746.

Dated: At San Francisco, California, this 3d day of January, 1924.

HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,

Attorneys for Defendants.

[Endorsed]: Filed Jan. 14, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[178]

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(Title of Court and Cause—No. 16,746—At Law.)

**Complaint.**

Now comes A. W. Knox of the city and county of San Francisco, State of California, in the South-

ern Division of the Northern District of California, and complains of the defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, and for cause of action allege:

I.

That at all times herein mentioned plaintiff was, and now is a citizen and resident of the city and county of San Francisco in the Northern District of California.

II.

That the defendant Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Minnesota; that the defendant Southern Pacific Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that at all times herein mentioned each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one state or territory of the United States to other states and territories thereof; that each of said defendants is, and at all times herein mentioned was, subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," as amended. [179]

III.

That said defendant Northern Pacific Railway Company operates and at all times herein mentioned operated a railroad from the station of



Kennewick, in the State of Washington, to the city of Portland, in the State of Oregon. That said defendant Southern Pacific Company operates and at all times herein mentioned operated a railroad from said city of Portland to Sacramento, Stockton, Oroville, Woodland, Yuba, Lodi, Colusa, Chico, Modesto, Suisun, Roseville, Willows, Turlock, Martinez, Oakland, and San Francisco, in the State of California (hereinafter called said points of delivery). That said railroad, from the said station of Kennewick to the said city of Portland, passes through the stations of Grandview, Toppenish, Outlook, Mabton, Nass, Sunnyside, Parker, Midvale, Phillips, Wapato, Ashue, Satus, Harrah, Cowich, Yakima and Selah, which said stations are hereinafter called said intermediate stations. That all of said intermediate stations are in the State of Washington.

#### IV.

That prior to the year 1917, said defendants established a through route and joint rate on potatoes from said station of Kennewick to said points of delivery, which said through route and joint rate so established by defendants was in effect during and at the times that all the shipments described in paragraph V of this complaint moved. That said through route from said station of Kennewick to said points of delivery passes through said intermediate stations. That said railroad and said joint route from said station of Kennewick to said points of delivery passes through said intermediate stations. That it is a less distance from said inter-

mediate stations, and each of them, to said points of delivery than it is from said station of Kennewick to said points of delivery. That it is a longer distance from said station of Kennewick over the same line and route in the same [180] direction to said points of delivery than it is from said intermediate stations to said points of delivery, the shorter being included within the longer distance.

V.

That between the 10th day of March, 1920, and the 19th day of March, 1922, viz., on the dates hereinafter stated in this paragraph of this complaint, Walter A. Perry Company caused to be shipped and transported over the said lines and route of the defendants, Northern Pacific Railway Company and Southern Pacific Company, from said intermediate stations to said points of delivery, ninety-seven carloads of potatoes; that said ninety-seven carloads of potatoes were all transported from said intermediate stations to the said points of delivery.

That upon the arrival of said shipments at said points of delivery, the defendants demanded that said Walter A. Perry Company pay for the transportation thereof charges in excess of the charges then made by defendants for the transportation of the same quantity and of like kind of property for a longer distance over the same line in the same direction, the shorter being included within the longer distance; that is to say, the defendants demanded that said Walter A. Perry Company pay for the transportation of said potatoes charges greater than said defendants then charged for the

transportation of potatoes from the said station of Kennewick to the said points of delivery. That said Walter A. Perry Company thereupon paid said charges so demanded by defendants, which said charges so paid by said Walter A. Perry Company were greater than the compensation then charged by defendants for the transportation of all like kind of property for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

That the following statement shows the date of shipment of each carload, the number of the car in which it was shipped, the station from which the shipment was made, the place of destination of each shipment, the amount of the charges paid by said Walter A. Perry Company for the transportation thereof, the date that said charges were paid, and the amount of which the [181] charges so paid exceeding the charges then made for the transportation of the same quantity of like kind of property for the greater distance, as aforesaid, which said last-mentioned amount appears under the head "overcharge" in the following statement:

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
3/11/20	NYC—153208	Grandview	Sacramento	\$186.35	4/21/20	\$43.71
3/5/21	IOC-56782	Toppenish	Sacramento	\$251.90	3/19/21	\$59.39
3/17/21	NP-98132	Outlook	Oroville	\$266.40	4/1/21	\$63.00
3/14/21	DH-16847	Mabton	Sacramento	\$232.22	3/28/21	\$54.75
3/16/21	NP-95371	Toppenish	Sacramento	\$242.79	5/24/21	\$61.25
4/6/21	NP-95465	Nass	Sacramento	\$185.62	4/22/21	\$43.77
4/26/21	NP-98129	Grandview	Sacramento	\$205.78	4/26/21	\$48.52
5/2/21	BNP-98867	Nass	Sacramento	\$184.50	6/8/21	\$43.50
9/20/21	B&O-14540	Toppenish	Sacramento	\$203.31	10/15/21	\$61.75
9/26/21	NP-94603	Sunnyside	Sacramento	\$202.21	10/13/21	\$57.67
9/29/21	DLW-6329	Grandview	Woodland	\$217.49	11/8/21	\$44.13
9/29/21	NP-94952	Sunnyside	Yuba	\$270.97	10/7/21	\$87.42
9/29/21	NP-97476	Grandview	Oroville	\$240.31	10/29/31	\$61.66
9/29/21	RD-3853	Sunnyside	Lodi	\$225.43	10/4/21	\$58.58
9/30/21	FGE-28179	Sunnyside	Sacramento	\$212.79	10/12/21	\$50.17
9/30/21	RI-66099	Sunnyside	Colusa	\$221.35	10/29/21	\$44.35
10/5/21	NP-94477	Parker	Oroville	\$270.17	10/29/21	\$63.89

176 *Northern Pacific Railway Company et al.*

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
10/5/21	NP-94729	Toppenish	Yuba	\$246.74	10/20/21	\$51.85
10/10/21	L&N-15838	Midvale	Chico	\$243.64	11/25/21	\$50.71
10/15/21	NP-94729	Toppenish	Yuba	\$246.74	10/20/21	\$51.85
10/17/21	SP-33788	Sunnyside	Colusa	\$242.05	11/21/21	\$50.87
10/18/21	NP-28648	Phillips	Sacramento	\$220.03	11/2/21	\$54.00
10/19/21	NP-24221	Mabton	Sacramento	\$219.43	10/31/21	\$51.74
10/21/19	NP-29616	Toppenish	Oroville	\$307.91	11/4/21	\$72.81
10/21/21	NP-19617	Parker	Modesto	\$259.58	11/16/21	\$52.57
10/21/21	L&N-102181	Toppenish	Lodi	\$206.03	11/5/21	\$48.58
10/21/21	NP-48751	Phillips	Suisun	\$206.04	12/2/21	\$49.12
10/23/21	NP-34713	Phillips	Sacramento	\$218.44	11/3/21	\$51.50
10/23/21	NP-26082	Phillips	Sacramento	\$238.49	11/10/21	\$56.22
10/24/21	NP-48537	Sunnyside	Chico	\$240.67	11/25/21	\$50.57
10/27/21	Penn-100796	Phillips	Yuba	\$240.08	1/6/22	\$50.61
10/28/21	Penn-105006	Toppenish	Sacramento	\$240.83	11/8/21	\$56.78
10/28/21	GN-10671	Toppenish	Woodland	\$237.34	11/7/21	\$39.56
10/28/21	NP-49230	Wapato	Roseville	\$257.34	11/5/21	\$86.99



Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
10/31/21	Milw-8374	Grandview	Oroville	\$254.41	11/16/21	\$60.16
11/2/21	CNWO-14484	Toppenish	Colusa	\$276.00	11/19/21	\$58.00
11/2/21	NYC-156288	Mabton	Sacramento	\$237.49	11/12/21	\$67.71
11/2/21	Penn-104070	Sunnyside	Sacramento	\$312.04	11/18/21	\$81.08
11/4/21	NP-96724	Wapato	Woodland	\$276.54	11/4/21	\$48.19
11/5/21	NYC-154424	Wapato	Oroville	\$295.41	11/5/21	\$69.86
11/7/21	CNJ-9180	Ashue	Sacramento	\$254.03	11/31/21	\$74.49
11/7/21	NYC-15588	Parker	Sacramento	\$233.17	11/19/21	\$60.59
11/10/21	NYC-138728	Toppenish	Roseville	\$298.22	11/19/21	\$116.19
11/14/21	NP-97107	Wapato	Chico	\$315.05	11/25/21	\$66.20
11/17/21	RI-66069	Ashue	Sacramento	\$291.80	12/27/21	\$85.56
11/19/21	PFE-16260	Toppenish	Colusa	\$248.92	12/12/21	\$52.31
11/21/21	NP-96891	Satus	Sacramento	\$222.75	12/5/21	\$52.52
11/27/21	Penn-100796	Sunnyside	Yuba	\$240.08	12/9/21	\$49.84
11/29/21	NP-97408	Mabton	Yuba	\$255.99	12/11/21	\$70.49
12/7/21	Penn-102135	Sunnyside	Chico	\$259.30	1/24/22	\$54.49
12/8/21	B&O-1551	Outlook	Sacramento	\$222.75	12/21/21	\$52.52

178 *Northern Pacific Railway Company et al.*

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
12/8/21	NYC-145023	Sunnyside	Chico	\$254.75	12/19/21	\$53.54
[182]						
12/8/21	IC-58451	Sunnyside	Sacramento	\$263.40	12/22/21	\$62.10
12/9/21	CBQ-38421	Wapato	Roseville	\$259.51	12/22/21	\$82.75
12/12/21	NP-97470	Wapato	Yuba	\$262.30	12/22/22	\$55.12
12/13/21	NP-96370	Toppenish	Willows	\$275.61	12/23/21	\$40.86
12/14/21	NP-94437	Toppenish	Colusa	\$248.75	1/14/22	\$52.28
12/15/21	NP-96159	Toppenish	Chico	\$248.98	1/24/22	\$52.32
12/16/21	NYC-144457	Toppenish	Oroville	\$268.32	12/29/21	\$70.70
12/16/21	NH-22079	Grandview	Yuba	\$256.54	1/6/22	\$53.91
12/17/21	RD-11691	Toppenish	Sacramento	\$221.58	12/29/21	\$49.24
12/29/21	NP-97088	Toppenish	Sacramento	\$244.16	1/13/22	\$57.57
1/4/22	NP-96689	Toppenish	Sacramento	\$201.40	1/14/22	\$47.18
1/3/22	NP-05291	Toppenish	Sacramento	\$200.57	1/13/22	\$45.88
1/4/22	NP-94406	Toppenish	Chico	\$226.87	1/27/22	\$47.18
1/5/22	NP-98129	Toppenish	Roseville	\$225.48	1/16/22	\$72.16
1/6/22	NP-94775	Toppenish	Oroville	\$240.54	1/20/22	\$56.12

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
1/6/22	NP-96387	Toppenish	Woodland	\$214.41	2/7/22	\$36.03
1/6/22	NP-96677	Toppenish	Sacramento	\$204.60	1/23/22	\$47.93
1/7/22	NP-94783	Toppenish	Suisun	\$201.85	2/2/22	\$47.28
1/7/22	NP-95078	Toppenish	Roseville	\$225.61	1/16/22	\$72.20
1/9/22	NP-98289	Toppenish	Colusa	\$226.07	2/22/22	\$47.02
1/10/22	RD-4271	Toppenish	Yuba	\$227.68	2/9/22	\$47.35
1/10/22	NP-98787	Toppenish	Sacramento	\$200.33	2/2/22	\$46.92
1/21/22	CBQ-38470	Grandview	Sacramento	\$205.82	2/11/22	\$48.15
1/26/22	NP-98645	Grandview	Turlock	\$231.50	1/26/22	\$43.60
1/27/22	NP-98197	Grandview	Oroville	\$248.91	2/14/22	\$64.45
1/27/22	NP-97284	Grandview	Sacramento	\$205.40	2/11/22	\$48.11
1/28/22	NP-98497	Grandview	Chico	\$235.48	2/27/22	\$47.48
1/28/22	CBQ-38403	Grandview	Martinez	\$205.35	2/23/22	\$40.28
1/28/22	NP-96654	Grandview	Sacramento	\$221.39	2/7/22	\$51.84
2/17/22	NP-97056	Toppenish	Sacramento	\$200.01	2/17/22	\$46.55
9/24/21	NP-98678	Harrish	Roseville	\$248.61	10/5/21	\$92.77
11/25/21	NP-96854	Cowick	Sacramento	\$239.46	3/11/22	\$70.25

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
12/8/21	NP-98556	Wapato	Sacramento	\$249.72	12/22/21	\$48.90
1/11/22	NP-97669	Toppenish	San Francisco	\$201.07	1/27/22	\$47.10
1/23/22	NP-97051	Toppenish	San Francisco	\$200.23	2/4/22	\$46.83
1/23/22	NP-96238	Toppenish	San Francisco	\$200.30	2/4/22	\$46.90
1/24/22	NP-97983	Toppenish	San Francisco	\$217.48	2/11/22	\$50.88
1/25/22	NP-98654	Toppenish	San Francisco	\$229.80	2/8/22	\$53.90
1/26/22	NP-96275	Toppenish	San Francisco	\$202.71	2/9/22	\$47.48
1/27/22	NP-98873	Toppenish	Oakland	\$220.03	2/9/22	\$66.70
1/31/22	NP-98864	Toppenish	San Francisco	\$225.06	2/13/22	\$52.72
3/7/21	RD-8605	Mabton	Sacramento	\$205.13	3/17/22	\$48.05
3/14/22	NP-94837	Toppenish	Woodland	\$194.35	3/25/22	\$41.35
3/16/22	NP-95072	Toppenish	Sacramento	\$203.02	3/29/22	\$47.56
3/18/22	NP-98019	Yakima	Sacramento	\$223.88	4/3/22	\$66.63

That the figures in the column headed "Date of Shipment" and in the column headed "Date of Payment" shows the months of the year and the second figure the day of the month and the third figure the year of the twentieth century.

VI.

That neither of said defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery than from said intermediate stations to said points of delivery. That a lower rate or compensation for the haul from said station of Kennewick to said points of delivery did not exist on the 18th day of June, 1910, the time of the passage of the Act of Congress of June 18, 1910, amendatory to said Act of Congress of February 4, 1887. [183] That the Interstate Commerce Commission never authorized said defendants, or either of them, to charge less from Kennewick to said points of delivery than from said intermediate stations to said points of delivery than from said intermediate stations to said points of delivery.

VII.

That at all times herein mentioned said Walter A. Perry Company was, and now is, a copartnership and firm the copartners and members of which are, and at all times herein mentioned were, Walter A. Perry, A. H. Willi and B. K. Young; that each of said persons is, and at all times herein mentioned was, a citizen and resident of the State of California; that prior to the commencement of this action said Walter A. Perry Company assigned, trans-



ferred and set over unto plaintiff all claims and demands of said Walter A. Perry Company against Northern Pacific Railway Company and Southern Pacific Company for the recovery of said overcharges and excessive charges paid by said Walter A. Perry Company to said defendants or either of them, and also all claims and demands of said Walter A. Perry Company against said defendants or either of them, for damages on account of the exaction on payment of said excessive charges.

## VIII.

That neither nor any of said defendants has paid to plaintiff or to said Walter A. Perry Company the amount of said overcharges, or any part thereof, or any interest thereon.

## IX.

That prior to the commencement of this action said Walter A. Perry Company, filed with the clerk of the county in which the principal place of business of said copartnership is situated a certificate stating the names in full of all of the members of said partnership, and their places of residence. That prior to the commencement of this action said certificate was published once a week for four successive weeks in a newspaper published in said county. That said certificate [184] so filed and published, as aforesaid, was signed by said partners and acknowledged before an officer authorized to take the acknowledgment of conveyances of real property.

For a further and additional cause of action against said defendants plaintiff alleges:

I.

That at all times herein mentioned plaintiff was, and now is a citizen and resident of the city and county of San Francisco in the Northern District of California.

II.

That the defendant Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Minnesota; that the defendant Southern Pacific Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that at all times herein mentioned each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one State or Territory of the United States to other States and Territories thereof; that each of said defendants is, and at all times herein mentioned was, subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," as amended.

III.

That said defendant Northern Pacific Railway Company operates and at all times herein mentioned operated a railroad from the station of Kennewick, in the State of Washington, to the city of Portland, in the State of Oregon. That said defendants Southern Pacific Company operates and at all times herein mentioned operated a railroad from said city of Portland to Sacramento, Stockton, and San

Francisco, in the State of California (hereinafter called said points of delivery). That said railroad from the said station of Kennewick to the said city of Portland, passes through [185] the stations of Toppenish and Sunnyside, which said stations are hereinafter called said intermediate stations. That all of said intermediate stations are in the State of Washington.

#### IV.

That prior to the year 1917, said defendants established a through route and joint rate on potatoes from said station of Kennewick to said points of delivery, which said through route and joint rate so established by defendants was in effect during and at the times that all the shipments described in paragraph V of this complaint moved. That said through route from said station of Kennewick to said points of delivery passes through said intermediate stations. That said railroad and said joint route from said station of Kennewick to said points of delivery passes through said intermediate stations. That it is a less distance from said intermediate stations, and each of them, to said points of delivery than it is from said station of Kennewick to said points of delivery. That it is a longer distance from said station of Kennewick over the same line and route in the same direction to said points of delivery than it is from said intermediate stations to said points of delivery, the shorter being included within the longer distance.

#### V.

That between the 10th day of January, 1921, and

the 3d day of November, viz., 1921, on the dates hereinafter stated in this paragraph of this complaint, John Demartini Company, a corporation, caused to be shipped and transported over the said lines and route of the defendants, Northern Pacific Railway Company and Southern Pacific Company, from said intermediate stations to said points of delivery, five carloads of potatoes; that said five carloads of potatoes were all transported from said intermediate stations to the said points of delivery. [186]

That upon the arrival of said shipments at said points of delivery, the defendants demanded that said John Demartini Company pay for the transportation thereof charges in excess of the charges then made by defendants for the transportation of the same quantity and of like kind of property for a longer distance over the same line in the same direction, the shorter being included within the longer distance; that is to say, the defendants demanded that said John Demartini Company pay for the transportation of said potatoes charges greater than said defendants then charged for the transportation of potatoes from the said station of Kennewick to the said points of delivery. That said John Demartini Company thereupon paid said charges so demanded by defendants, which said charges so paid by said John Demartini Company were greater than the compensation then charged by defendants for the transportation of like kind of property for a longer distance over the same line or route in the same

direction, the shorter being included within the longer distance.

That the following statement shows the date of shipment of each carload, the number of the car in which it was shipped, the station from which the shipment was made, the place of destination of each shipment, the amount of the charges paid by said John Demartini Company for the transportation thereof, the date that said charges were paid, and the amount by which the charges so paid exceeded the charges then made for the transportation of the same quantity of like kind of property for the greater distance, as aforesaid, which said last-mentioned amount appears under the head "Overcharge" in the following statement: [187]



Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
11/ 2/21	NP-37583	Toppenish	Stockton	\$232.91	11/20/21	\$60.05
10/13/21	NP-37500	Toppenish	Sacramento	\$226.50	11/30/21	\$56.18
10/23/21	NP-97703	Toppenish	San Francisco	\$184.53	11/ 7/21	\$43.51
1/11/21	NP-37524	Toppenish	San Francisco	\$196.68	10/29/21	\$46.38
9/28/21	NP-97262	Sunnyside	San Francisco	\$220.11	10/14/21	\$51.90

That the first figure in the column headed "Date of Shipment" and in the column headed "Date of Payment" shows the months of the year and the second figure the day of the month and the third figure the year of the twentieth century.

## VI.

That neither of said defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery than from said intermediate stations to said points of delivery. That a lower rate or compensation for the haul from said station of Kennewick to said points of delivery did not exist on the 18th day of June, 1910, the time of the passage of the Act of Congress of June 18, 1910, amendatory to said Act of Congress of February 4, 1887. That the Interstate Commerce Commission never authorized said defendants, or either of them, to charge less from Kennewick to said points of delivery than from said intermediate stations to said points of delivery.

## VII.

That at all times herein mentioned said John Demartini Company was, and now is, a corporation organized and existing under the laws of the State of California.

That prior to the commencement of this action said John Demartini Company assigned, transferred and set over unto plaintiff all claims and demands of said John Demartini Company against Northern Pacific Railway Company and Southern Pacific Company for the recovery of said overcharges and excessive

charges paid by said John Demartini Company to said defendants or either of them, and also all claims and demands of said John Demartini Company against said defendants, or either of them, for damages on account of the exaction on payment of said excessive charges.

For a further and additional cause of action against said defendants plaintiff alleges:

I.

That at all times herein mentioned plaintiff was, and now is, [188] a citizen and resident of the city and county of San Francisco in the Northern District of California.

II.

That the defendant Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Minnesota; that the defendant Southern Pacific Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that at all times herein mentioned each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one state or territory of the United States to other states and territories thereof; that each of said defendant is, and at all times herein mentioned was, subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," as amended.

## III.

That said defendant Northern Pacific Railway Company operates, and at all times herein mentioned operated, a railroad from the station of Kennewick, in the State of Washington, to the city of Portland, in the State of Oregon. That said defendant Southern Pacific Company operates, and at all times herein mentioned operated, a railroad from said city of Portland to San Francisco and Oakland in the State of California (hereinafter called said points of delivery). That said railroad, from the said station of Kennewick to the said city of Portland, passes through the stations of Ashue, Toppenish, Wapato and Grandview, which said stations are hereinafter called said intermediate stations. That all of said intermediate stations are in the State of Washington.

## IV.

That prior to the year 1917, said defendants established a through route and joint rate on potatoes from said station of Kennewick to said points of delivery, which said through [189] route and joint rate so established by defendants was in effect during and at the times that all the shipments described in paragraph V of this complaint moved. That said through route from said station of Kennewick to said points of delivery passes through said intermediate stations. That said railroad and said joint route from said station of Kennewick to said points of delivery passes through said intermediate stations. That it is a less distance from said intermediate stations, and each of them, to said points of

delivery than it is from said station of Kennewick to said points of delivery. That it is a longer distance from said station of Kennewick over the same line and route in the same direction to said points of delivery than it is from said intermediate stations to said points of delivery, the shorter being included within the longer distance.

V.

That between the 2d day of November, 1921, and the 24th day of February, 1922, viz., on the dates hereinafter stated in this paragraph of this complaint, L. Scatena & Company—A. Galli Fruit Company, consolidated, a corporation (hereinafter called said shipper) caused to be shipped and transported over the said lines and route of the defendants, Northern Pacific Railway Company and Southern Pacific Company, from said intermediate stations to said points of delivery, fourteen carloads of potatoes; that said fourteen carloads of potatoes were all transported from said intermediate stations to the said points of delivery.

That upon the arrival of said shipments at said points of delivery, the defendants demanded that said shipper pay for the transportation thereof charges in excess of the charges then made by defendants for the transportation of the same quantity and of like kind of property for a longer distance over the same line in the same direction, the shorter being included within the longer distance; that is to say, the defendants [190] demanded that said shipper pay for the transportation of said potatoes charges greater than said defendants then charged



for the transportation of potatoes from the said station of Kennewick to the said points of delivery. That shipper thereupon paid said charges so demanded by defendants, which said charges so paid by said shipper were greater than the compensation then charged by defendants for the transportation of like kind of property for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

That the following statement shows the date of shipment of each carload, the number of the car in which it was shipped, the station from which the shipment was made, the place of destination of each shipment, the amount of the charges paid by said shipper for the transportation thereof, the date that said charges were paid, and the amount by which the charges so paid exceed the charges *them* made for the transportation of the same quantity of like kind of property for the greater distance, as aforesaid, which said last mentioned amount appears under the head "Overcharge" in the following statement:

Date of Shipment	No. of Car	Station From Which Shipped	Place of Destination	Charges Paid	Date of Payment	Over-charge
11/3/21	B&O-13657	Ashue	San Francisco	\$274.31	11/17/21	\$80.43
12/14/21	NP-98461	Toppenish	San Francisco	\$229.00	1/ 2/22	\$54.00
12/10/21	LV-35126	Wapato	San Francisco	\$226.60	12/22/21	\$53.43
12/12/21	CBQ-38539	Ashue	San Francisco	\$268.66	12/29/21	\$78.78
12/12/21	NP-96575	Wapato	San Francisco	\$224.49	12/29/21	\$52.93
12/9/21	NYC-152247	Ashue	San Francisco	\$277.47	12/22/21	\$81.37
12/9/21	CBQ-38657	Wapato	San Francisco	\$221.02	12/23/21	\$51.52
12/2/21	OSTPM-8620	Ashue	Oakland	\$273.15	1/3/22	\$80.10
1/9/22	NP-95427	Toppenish	San Francisco	\$203.47	1/21/22	\$47.66
1/9/22	NP-97435	Wapato	San Francisco	\$199.53	1/21/22	\$46.85
1/11/22	NP-97546	Wapato	San Francisco	\$210.87	1/25/22	\$49.40
1/24/22	NP-95202	Wapato	San Francisco	\$233.24	2/6/22	\$54.64
2/7/22	NP-97033	Grandview	San Francisco	\$207.18	2/6/22	\$48.53
1/6/22	NP-96559	Wapato	Oakland	\$214.62	2/23/22	\$50.27

That the first figure in the column headed "Date of Shipment" and in the column headed "Date of Payment" shows the months of the year and the second figure the day of the month and the third figure the year of the twentieth century.

## VI.

That neither of said defendants ever applied to the Interstate [191] Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery than from said intermediate stations to said points of delivery. That a lower rate or compensation for the haul from said station of Kennewick to said points of delivery did not exist on the 18th day of June, 1910, the time of the passage of the Act of Congress of June 18, 1910, amendatory to said Act of Congress of February 4, 1887. That the Interstate Commerce Commission never authorized said defendants, or either of them, to charge less from Kennewick to said points of delivery than from said intermediate stations to said points of delivery.

## VII.

That said shipper is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California.

That prior to the commencement of this action said shipper assigned, transferred and set over unto plaintiff all claims and demands of said shipper against Northern Pacific Railway Company and Southern Pacific Company for the recovery of said overcharges and excessive charges paid by said shipper to said defendants or either of them, and

also all claims and demands of said shipper against said defendants or either of them, for damages on account of the exaction on payment of said excessive charges.

For a further and additional cause of action against said defendants plaintiff alleges:

I.

That at all times herein mentioned plaintiff was, and now is, a citizen and resident of the city and county of San Francisco in the Northern District of California.

II.

That the defendant Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Minnesota; that the defendant Southern Pacific Company is, and [192] at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that at all times herein mentioned each of said defendants was and now is a common carrier engaged in the transportation of passengers and property wholly by railroad from one state or territory of the United States to other states and territories thereof; that each of said defendants is, and at all times herein mentioned was, subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," as amended.

III.

That said defendant Northern Pacific Railway Company operates and at all times herein mentioned

operated a railroad from the station of Kennewick, in the State of Washington, to the city of Portland, in the State of Oregon. That said defendant Southern Pacific Company operates and at all times herein mentioned operated a railroad from said city of Portland to San Francisco in the State of California (hereinafter called said point of delivery). That said railroad, from the said station of Kennewick to the said city of Portland, passes through the stations of Outlook, Sunnyside and Selah, which said stations are hereinafter called said intermediate stations. That all of said intermediate stations are in the State of Washington.

## IV.

That prior to the year 1917, said defendants established a through route and joint rate on potatoes from said station of Kennewick to said points of delivery, which said through route and joint rate so established by defendants was in effect during and at the times that all the shipments described in paragraph V of the complaint moved. That said through route from said station of Kennewick to said points of delivery passes through said intermediate stations. That said railroad and said joint route from said station of Kennewick to said points of delivery passes through said intermediate stations. That it is a less distance from said intermediate stations, [193] and each of them, to said points of delivery than it is from said stations of Kennewick to said points of delivery. That it is a longer distance from said



station of Kennewick over the same line and route in the same direction to said points of delivery than it is from said intermediate stations to said points of delivery, the shorter being included within the longer distance.

V.

That between the 14th day of November, 1920, and the 22d day of November, 1921, viz., on the dates hereinafter stated in this paragraph of this complaint F. M. Burnham (hereinafter called said shipper) caused to be shipped and transported over the said lines and route of the defendants, Northern Pacific Railway Company and Southern Pacific Company, from said intermediate stations to said points of delivery, seventeen carloads of potatoes; that said seventeen carloads of potatoes were all transported from said intermediate stations to the said points of delivery.

That upon the arrival of said shipments at said points of delivery, defendants demanded that said shipper pay for the transportation thereof charges in excess of the charges then made by defendants for the transportation of the same quantity and of like kind of property for a longer distance over the same line in the same direction, the shorter being included within the longer distance; that is to say, the defendants demanded that the said shipper pay for the transportation of said potatoes charges greater than said defendants then charged for the transportation of potatoes from the said station of Kennewick to the said points of delivery. That said shipper thereupon paid

said charges so demanded by defendants, which said charges so paid by said shipper were greater than the compensation then charged by defendants for the transportation of like kind of property for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

That the following statement shows the date of shipment [194] of each carload, the number of the car in which it was shipped, the station from which the shipment was made, the place of destination of each shipment, the amount of the charges paid by said shipper for the transportation thereof, the date that said charges were paid, and the amount by which the charges so paid exceeded the charges then made for the transportation of the same quantity of like kind of property for the greater distance, as aforesaid, which said last-mentioned amount appears under the head "Overcharge" in the following statement:

Date of Shipment	No. of Car	Station From Which Shipped	Destination	Charges Paid	Date of Payment	Over-charge
11/15/20	NP-95475	Outlook	San Francisco	\$260.44	12/ 3/20	\$67.67
12/ 3/20	CBQ-38884	Sunnyside	San Francisco	\$234.70	12/20/20	\$60.99
11/19/20	PFE-143	Sunnyside	San Francisco	\$229.18	12/27/20	\$54.04
11/16/20	PFE-4119	Sunnyside	San Francisco	\$226.72	11/27/20	\$53.46
11/ 4/21	PFE-85575	Sunnyside	San Francisco	\$225.40	11/17/21	\$53.15
6/ 6/21	PFE-13853	Sunnyside	San Francisco	\$191.82	6/23/21	\$45.23
11/ 4/21	PFE-6720	Sunnyside	San Francisco	\$230.44	11/17/21	\$54.34
11/15/21	PFE-10413	Sunnyside	San Francisco	\$226.14	11/29/21	\$53.32
11/21/21	PFE-3954	Sunnyside	San Francisco	\$235.48	12/ 5/21	\$55.52
6/ 8/21	NP-95563	Selah	San Francisco	\$184.50	6/24/21	\$43.50
11/17/21	PRR-100772	Sunnyside	San Francisco	\$227.30	11/29/21	\$53.59
11/ 8/21	NP-98826	Sunnyside	San Francisco	\$236.71	11/23/21	\$55.81
11/ 5/21	Pa-108790	Outlook	San Francisco	\$250.24	11/19/21	\$59.00
11/ 4/21	NP-98849	Sunnyside	San Francisco	\$243.14	11/17/21	\$57.33
10/29/21	OMA-8898	Outlook	San Francisco	\$247.54	11/14/21	\$58.37
6/ 6/21	PFE-902	Selah	San Francisco	\$187.24	6/23/21	\$44.15
6/ 4/21	NP-98248	Sunnyside	San Francisco	\$201.78	6/23/21	\$47.57

That the first figure in the column headed "Date of Shipment" and in the column headed "Date of Payment" shows the months of the year and the second figure the day of the month and the third figure the year of the twentieth century.

#### VI.

That neither of said defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery than from said intermediate stations to said points of delivery. That a lower rate or compensation for the haul from said station of Kennewick to said points of delivery did not exist on the 18th day of June 1910, the time of the passage of the Act of Congress of June 19, 1910, amendatory to said Act of Congress of February 4, 1887. That the Interstate Commerce Commission [195] never authorized said defendants or either of them, to charge less from Kennewick to said points of delivery than from said intermediate stations to said points of delivery.

#### VII.

That said shipper is, and at all times herein was citizen and resident of the city and county of San Francisco in the Northern District of California.

That prior to the commencement of this action said shipper assigned, transferred, and set over unto plaintiff all claims and demands of said shipper against Northern Pacific Railway Company and Southern Pacific Company for the recovery of said overcharges and excessive charges paid by said shipper to said defendants or either of them,

and also all claims and demands of said shipper against said defendants or either of them, for damages on account of the exaction on payment of said excessive charges.

That the amount in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of \$3,000, and is between citizens of different states, to wit, between the plaintiff, a citizen and resident of the State of California, and the defendants who are citizens and residents of the States of Minnesota and Kentucky, as hereinabove alleged.

THEREFORE plaintiff prays judgment against defendants for the amount of said overcharges, as alleged in paragraph V of each of said causes of action, to wit, for the sum of \$7,155.15, together with interest on each overcharge at the rate of seven per cent per annum from the date of the payment thereof, and for the further sum of \$2,000 as attorney's or counsel fees. And the plaintiff also prays judgment for his costs of suit.

ALFRED J. HARWOOD,  
Attorney for Plaintiff. [196]

State of California,  
City and County of San Francisco,  
Northern District of California,—ss.

A. W. Knox, having first duly sworn, deposes and says: That he is the plaintiff above named; that he has read the within and foregoing complaint and knows the contents thereof and that the same is true of his own knowledge.

A. W. KNOX.



Subscribed and sworn to before me this 30th day of June, 1922.

[Seal] E. M. CLARK,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Jun. 30, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [197]

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(Title of Court and Cause—No. 16746.)

**Answer of Defendants, Northern Pacific Railway  
Company and Southern Pacific Company.**

Now come the defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, and, for answer to the complaint herein, admit, aver and deny as follows, to wit:

Answering the first cause of action therein alleged:

I.

Deny that the line of railroad maintained by defendant, Northern Pacific Railway Company, from the station of Kennewick, in the State of Washington to the city of Portland, in the State of Oregon, passes through the stations of Midvale, Ashue, Harrah or Cowich, and deny that said last-named stations, or any of them, are intermediate to said station of Kennewick and said city of Portland upon the line of defendant Northern Pacific Railway Company, passing between said points, or that said stations, or any of them, are

intermediate to said station of Kennewick and said points of destination, or any of them, mentioned in the complaint.

II.

Deny that said, or any, through route from said station of Kennewick to said points of delivery, or any of them, passes through said stations of Midvale, Ashue, Harrah or Cowich; and deny that said railroad or said joint route from said station of Kennewick to said points of delivery, or any of them, passes through said last-named stations, or any of them.

III.

Admit, subject to verification, that Walter A. Perry Company made the shipments of potatoes between the points described in paragraph V of the first cause of action of said complaint and paid freight charges thereon, as alleged in said paragraph. [198]

IV.

Deny that neither of defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery, or any of them, than from said intermediate stations, or any of them, to said points of delivery, or any of them.

V.

Aver that they have not sufficient knowledge, information, or belief upon the subject to enable them to answer any of the allegations contained in paragraphs VII and IX of the first cause of action of said complaint, and, upon that ground,

deny each and every, all and singular, the allegations contained in said paragraphs, and each of them.

Answering the second cause of action set forth in said complaint, said defendants admit, aver and deny as follows:

### I.

Admit, subject to verification, that John Demartini Company, a corporation, made the shipments of potatoes between the points described in paragraph V of the second cause of action of said complaint, and paid the freight charges thereon, as alleged in said paragraph.

### II.

Deny that neither of defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennebec to said points of delivery, or any of them, than from said intermediate stations, or any of them, to said points of delivery, or any of them.

### III.

Aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer any of the allegations set forth in paragraph VII of said second cause of action, and, upon that ground, deny each and every, all and singular, the allegations in said paragraph contained.

Answering the third cause of action set forth in said complaint, said defendants admit, aver and deny as follows, to wit: [199]

I.

Deny that the railroad line of defendant Northern Pacific Railway Company, between the city of Kennewick in the State of Washington, and the city of Portland, in the State of Oregon, passes through the station of Ashue, and deny that said station of Ashue is intermediate upon said line of railroad to the station of Kennewick and the city of Portland or to said station of Kennewick and any of the points of destination named in said third cause of action.

II.

Deny that said, or any, through route from said station of Kennewick to said points of delivery, or any of them, passes through said station of Ashue, or that said or any railroad, or said or any joint route from said station of Kennewick to said points of delivery, or any of them, passes through said station of Ashue or that the same was an intermediate station upon said railroad line or route.

III.

Admit, subject to verification, that L. Scatena & Company—A. Galli Fruit Company, consolidated, made the shipments of potatoes between the points described in paragraph V of the third cause of action of said complaint, and paid the freight charges thereon, as alleged in said paragraph.

IV.

Deny that neither of defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kenne-

wick to said points of delivery, or any of them, than from said intermediate stations, or any of them, to said points of delivery, or any of them.

## V.

Aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer any of the allegations contained in paragraph VII of said third cause of action, and, upon that ground, deny each and every, all and singular, the allegations in said paragraph contained. [200]

Answering the fourth cause of action set forth in said complaint, defendants admit, deny and aver as follows, to wit:

## I.

Admit, subject to verification, that F. M. Burnham made the shipments of potatoes between the points described in paragraph V of the fourth cause of action of said complaint, and paid the freight charges thereon, as alleged in said paragraph.

## II.

Deny that neither of defendants ever applied to the Interstate Commerce Commission for authority to charge less from said station of Kennewick to said points of delivery, or any of them, than from said intermediate stations, or any of them, to said points of delivery, or any of them.

## III.

Aver that they have not sufficient knowledge, information or belief upon the subject to enable them to answer any of the allegations contained in



paragraph VII of said fourth cause of action, and, upon that ground, deny each and every, all and singular, the allegations in said paragraph contained.

### SECOND SEPARATE DEFENSE.

And for a further, separate and second answer and defense to said complaint and each and all of the causes of action therein set forth, defendants aver that the stations of Midvale, Ashue, Harrah and Cowich, and each of them, are not situated upon the line of defendant Northern Pacific Railway Company passing between the city of Kennewick, in the State of Washington, and the city of Portland, in the State of Oregon, but said stations are, and each of them is, situated upon a branch line of defendant Northern Pacific Railway Company, and that said stations are not, nor is any of said stations, intermediate upon said line of railway of Northern Pacific Railway Company passing between said city of Kennewick and said City of Portland, or between said city of Kennewick and any of the points of destination mentioned in the complaint. [201]

### THIRD SEPARATE DEFENSE.

And for a further, separate and third answer and defense to said complaint and each and all of the causes of action therein set forth, defendants aver that on or about the 11th day of February, 1911, these defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon po-

tatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington. That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, intermediate to said California points herein named, and said station of Pasco. That said application has never been cancelled or withdrawn and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission.

#### FOURTH SEPARATE DEFENSE.

And for a further, separate and fourth answer and defense to said complaint and each and all of the causes of action therein set forth, defendants aver that neither the plaintiff nor its assignor has, prior to the commencement of this action, or at all, applied to the Interstate Commerce Commission for reparation for or on account of the matters and things alleged in said complaint, nor has said Commission ever made an order directing either of the defendants to pay to the plaintiff, or its assignor, any sum whatsoever for or on account of the assessment or collection of freight charges upon any of the shipments alleged in the complaint.

FIFTH SEPARATE DEFENSE.

And for a further, separate and fifth answer and defense to said complaint and each and all of the causes of [202] action therein set forth, defendants aver, upon information and belief, that neither plaintiff nor its assignor has been damaged by the payment of any of the freight charges mentioned in the complaint.

WHEREFORE, said defendants pray that plaintiff take nothing by its said action and that they may be dismissed hence with their costs.

HENLEY C. BOOTH,  
FRANK B. AUSTIN,

Attorneys for Defendants.

State of California,  
City and County of San Francisco,—ss.

G. L. King, being first duly sworn, deposes and says, that he is an officer, to wit, assistant secretary of defendant Southern Pacific Company, a corporation, and, as such officer, is duly authorized to and does make this verification for and on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to those matters that he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 28th day of September, 1922.

[Seal] FRANK HARVEY,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Due service of the within answer is admitted this 28th day of September, 1922.

A. J. HARWOOD,  
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 28, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[203]

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(Title of Court and Cause—No. 16746.)

**Trial Stipulation.**

It is stipulated that the allegations of paragraphs VII and IX of the first cause of action stated in the complaint are true and that no evidence thereof need be offered at the trial.

It is stipulated that the allegations of paragraph VII of the second, third and fourth causes of action stated in the complaint are true and that no evidence thereof need be offered at the trial.

Dated: March 9, 1923.

ALFRED J. HARWOOD,  
Attorney for Plaintiff.  
HENLEY C. BOOTH,  
FRANK B. AUSTIN,  
Attorneys for Defendants.

So ordered.

R. S. BEAN,  
Judge.

[Endorsed]: Filed Mch. 12, 1923. Walter B. Maling, Clerk. [204]

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At a stated term, to wit, the March term, A. D. 1923, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Wednesday, the 14th day of March in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable GEORGE M. BOURQUIN, District Judge for the District of Montana, designated to hold and holding this cause.

(Title of Cause—No. 16746.)

**Minutes of Court—March 14, 1923—Order Allowing  
Defendant to File an Amendment to Answer.**

\* \* \* \* \*

Ordered that defendant may file an amendment to answer.

\* \* \* \* \*

Defendants moved for a nonsuit on the grounds stated; which motion was submitted after arguments by counsel and being fully considered was denied.

\* \* \* \* \*



(Title of Court and Cause—No. 16746.)

**Amendment to Answer.**

Now come the defendants above named, and, by leave of Court first had and obtained, file this their amendment to their answer heretofore filed herein as follows:

**THIRD SEPARATE DEFENSE.**

And for a further, separate and third answer and defense to said complaint, defendants aver that on or about the 11th day of February, 1911, these defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington.

On or about the third day of February, 1914, the Interstate Commerce Commission duly gave, made and entered its order, known as Fourth Section Order. No. 3700, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof.

That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway

Company, in the State of Washington, 2.7 miles west of said station of Pasco and the same is a point on the said line adjacent and in close proximity to said station of Pasco, and is also intermediate to said California points herein named and said station of Pasco. That on or about the 17th day of May, 1911, the rates on potatoes from Pasco to said California points herein named were extended by said defendants to said station of Kennewick, and ever since that time said rates from Kennewick to said California destinations have been the same as the rates from Pasco to said destinations. [206]

That said application above referred to, which was filed with the Interstate Commerce Commission on or about the 11th day of February, 1911, has never been cancelled or withdrawn, and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission; that said Fourth Section Order No. 3700 has never been vacated, modified or set aside in whole or in part and was in full force and effect during all the times mentioned in the complaint herein and at the time of the movement of each of the shipments therein referred to, except that section 6 thereof has been eliminated.

H. C. BOOTH,

F. B. AUSTIN,

Attorneys for Defendants. [207]

State of California,  
City and County of San Francisco,—ss.

G. L. King, being duly sworn, deposes and says:

That he is an officer, to wit, assistant secretary of Southern Pacific Company, a corporation, one of the defendants named in the foregoing amendment to answer, and as such officer he is duly authorized to and does make this verification for and on behalf of said corporation; that he has read the foregoing amendment to answer and knows the contents thereof, and the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to such matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 14th day of March, 1923.

[Seal] FRANK HARVEY,  
Notary Public in and for the City and County of  
San Francisco, State of California. [208]

### Exhibit "A."

"The Commission being of the opinion that the convenience of the carriers, the public, and the Commission will be better served by assembling in one general fourth section order, divided into numbered sections for convenient tariff reference, the general fourth section orders known as Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12, and experience having suggested certain modifications in the description of conditions under which relief has been

afforded by these orders, and certain additional situations as to which carriers may be relieved from the operation of said section, therefore,

“It is ordered, That Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12, be, and the same are hereby, vacated and set aside as of March 15, 1914.

“It is further ordered, That effective March 15, 1914, as to and confined in all cases to rates and fares which are included in and covered by applications for relief from the provisions of the fourth section of the act to regulate commerce that were filed with the Commission on or before February 17, 1911, and until the applications included and covering such rates or fares have been passed on by the Commission, carriers may file with the Commission, in the manner and form prescribed by law and by the Commission’s regulations, such changes in rates and fares as occur in the ordinary course of their business, continuing higher rates or fares at intermediate points, and through rates or fares higher than the combination of intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not thereby increased. [209]

“It is further ordered, That as to and confined in all cases to rates which are included in and covered by applications as above described, carriers may file with the Commission, in the manner and form prescribed by law and by the Commission’s

regulations, changes in rates under the following conditions, although the discrimination against intermediate points is thereby increased:

“Section 1. A through rate which is in excess of the aggregate of the intermediate rates lawfully published and filed with the Commission may be reduced to equal the sum of the intermediate rates.

“Section 2. Where a through rate has been, or is hereafter, reduced under the authority of section 1 of this order, carriers maintaining through rates via other routes between the same points may meet the rates so made by the route initiating the reduction.

“Section 3. Where a reduction is made in the rate between two points under the authority of section 1 of this order, such reduction may extend to all points in the group which takes the same rates as does the point from or to which the rate has been reduced.

“Sec. 4. Where through rates are in effect which exceeds the lowest combination of rates lawfully published and filed with the Commission, carriers may correct said through rates by reducing the same to equal such lowest combination.

“Sec. 5. A longer line or route may reduce the rates in effect between the same points or groups of points to meet the rates of a shorter line or route when the present rates via either line do not conform to the fourth section of the act, under the following circumstances:

(a) Where the longer line is meeting a reduction in rates initiated by the shorter line. [210]



(b) Where the longer line has not at any time heretofore met the rates of the shorter line.

“Sec. 6. A newly constructed line publishing rates from and to its junction points under the authority contained in paragraph (b) of section 5, may establish from and to its local stations rates in harmony with those established from and to junction points.

“Sec. 7. Carriers whose rates between certain points do not conform to the fourth section of the act, which rates have been made lower than rates at intermediate points to meet the competition of water or rail-and-water carriers between the same points, may make such further reductions in rates as may be required to continue to effectively meet the competition of rail-and-water or all-water lines.

“Sec. 8. Where rates are in effect from or to a point that are lower than rates effective from or to intermediate points, carriers may extend the application of such rates to, or establish rates made with relation thereto at, points on the same line adjacent or in close proximity thereto, provided that no higher rates are maintained from and to points intermediate to the former point and the new point to which the application of the same or relative rates has been extended.

“Sec. 9. Where there is a rate on a commodity from or to one or more points in an established group of points from and to which rates are ordinarily the same, but the rate on the said commodity does not apply at all points in the said group, such

rate may be made applicable to or from all of such other points.

“Sec. 10. Where there is a definite and fixed relation between the rates from and to adjacent or continuous groups of points, and the rates to or from one of said groups are changed, corresponding changes may be made in the rates of the other [211] groups to preserve such relations.

“Sec. 11. In cases where no through rates are in effect via the various routes or gateways between two points, and the combination of lawfully published and filed rates via one gateway makes less than the combinations via the other gateway, a through rate may be established on the basis of the combination via the gateway over which the lowest combination can be made, and made applicable via all gateways.

“Sec. 12. In cases where through rates are in effect between two points, via one or more routes or gateways, which are higher than the combination of lawfully published and filed rates via one of these gateways, different carload minima being used on opposite sides of the gateway, a through rate may be established equal to the lowest combination of lawfully published and filed rates, using the higher of the carload minima but continuing the present higher through rate if based upon a lower carload minimum.

“The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investiga-

tion, and correction if in conflict with any provision of the act.

“And it is further ordered, That when the Commission passes upon any application for relief from the provisions of the fourth section with respect to the rates referred to herein, the order issued with relation thereto will automatically cancel the authority herein granted as to the rates covered and affected by such order.”

[Endorsed]: Filed Mch. 14, 1923. Walter B. Maling, Clerk. [212]

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At a stated term, to wit, the March term, A. D. 1923, of the Southern Division of the United States District Court, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 18th day of June, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable MAURICE T. DOOLING, District Judge.

(Title of Cause—No. 16746.)

**Minutes of Court—June 18, 1923—Order for Judgment.**

In accordance with the decision of the Honorable George M. Bourquin, United States District Judge for the District of Montana (before whom this case was heretofore tried), which said decision is this day filed,

IT IS ORDERED that judgment be entered herein in favor of plaintiff and against the defendants upon special findings to be filed. [213]

(Title of Court and Cause—No. 16746.)

**Findings of Fact and Conclusions of Law.**

The above-entitled action came duly on for trial on the 14th day of March, 1923, the plaintiff being represented by Alfred J. Harwood, his attorney, and the defendants by Messrs. Elmer Westlake, James E. Lyons, and Frank B. Austin, their attorneys.

Said action was tried on the 14th and 15th days of March, 1923, and was thereupon submitted to the Court for its decision. After due consideration the Court makes and files this its decision, embracing its findings of fact and conclusions of law, as follows:

I.

That all of the allegations of subdivisions I, II, IV, VI, VII, VIII and IX of the first cause of action stated in the complaint herein, are true and are sustained by evidence. That all of the allegations of subdivisions I, II, III, IV, V, VI and VII of the second cause of action stated in the complaint herein are true and are sustained by the evidence. That all of the allegations of subdivisions I, II, IV, VI, and VII of the third cause of action stated in the complaint are true and are sustained by the evidence. That all of the allegations of subdivisions I, II, III, IV, V, VI and VII of the fourth cause of action stated in the complaint are true and are sustained by the evidence.

II.

That all of the allegations of subdivisions III

and V of the first and third causes of action stated in the complaint, are true and are sustained by the evidence except as otherwise specifically found by finding of fact number III, and except as otherwise specifically found in finding of fact number III, all of the allegations of said subdivisions III and V of said causes of action are true and are sustained by the evidence.

III.

That the stations of Harrah, Ashue and Cowiche, mentioned [214] and described in subdivisions III and V of the first and third causes of action stated in the complaint are not on the main line of the defendant, Northern Pacific Railway Company, between Kennewick and Portland, but are on short branch or spur lines which connect with said main line between Kennewick and Portland; that said stations are distant from the main line as follows, viz.:

Name of Station	Distance from Main Line in Miles
Harrah	9.5
Ashue	5.2
Cowiche	9.2

that the points from which said branch lines to said stations above mentioned diverge from the said main line are all more than 67 miles west of Kennewick, and are all intermediate between Kennewick and Portland. That in case of shipments from said stations, the plaintiff is not entitled to recover the full amount of the alleged overcharge stated in subdivisions V of the first and



third causes of action stated in the complaint, but is entitled to recover the difference between said alleged overcharge and the charge then made by defendant, Northern Pacific Railway Company, for the haul from said stations respectively to said main line; that the amount of the overcharge on shipments from said stations is as follows: In shipment from Ashue in Car No. CNJ 9180, the amount of the overcharge was and is the sum of \$49.80 instead of the sum of \$74.49 as stated in the complaint. In the case of the shipment from Ashue in Car Number RI 66069, the amount of the overcharge was and is the sum of \$57.04 instead of the sum of \$85.56 as stated in the complaint. In the shipment from Harrah in Car Number NP 98678, the amount of the overcharge was and is the sum of \$71.23 instead of the sum of \$92.77 as stated in the complaint. In the shipment from Cowiche in Car Number NP 96854 the amount of the overcharge was and is the sum of \$46.37 instead of the sum of \$70.25 as stated in the complaint. In the shipment from Ashue in Car Number [215] B&O 13657, the amount of the overcharge was and is the sum of \$53.62 instead of the sum of \$80.43 as stated in the complaint. In the shipment from Ashue in Car Number CBQ 38539, the amount of the overcharge was and is the sum of \$52.52 instead of the sum of \$78.78 as stated in the complaint. In the shipment from Ashue in Car Number NYC 152247 the amount of the overcharge was and is the sum of \$54.26 instead of the sum of \$81.37 as stated in the complaint. That in the

shipment from Ashue in Car Number CSTPM 8620, the amount of the overcharge was and is the sum of \$53.40 instead of the sum of \$80.10 as stated in the complaint. That for all practical rate-making purposes said stations mentioned in this finding are intermediate between Kennewick and Portland, and also between Kennewick and the stations of delivery. That the shipment made in Car. No. L&N 15838 from Midvale as described in subdivision V of the first cause of action stated in the complaint was not made over the lines of the defendants.

#### IV.

With relation to the second separate defense set up in defendant's answer, the Court finds as follows: That the stations mentioned in said separate defense with the exception of Midvale are not on the line of the Northern Pacific Railway Company passing between Portland and Kennewick, but are on short branch lines which diverge from said main line, as more specifically appears in finding of fact No. III; that for all practical rate-making purposes said stations, with the exception of Midvale, are intermediate between Kennewick and Portland, and between Kennewick and the points of destination mentioned in the complaint. That said station of Midvale is not on the line of the defendant Northern Pacific Railway Company.

#### V.

That on October 14, 1910, the Interstate Commerce Commission made an order in the words<sup>1</sup> and figures set forth in Exhibit "A" attached to and

made a part of these findings; that on December 16, 1910, the defendants filed with the Interstate Commerce Commission a so-called application for [216] relief from the provisions of the fourth section of the Interstate Commerce Act, a copy of which said so-called application is marked Exhibit "B" and made a part of these findings; that on December 16, 1910, said defendants filed with the Interstate Commerce Commission a so-called application for relief from the provisions of the fourth section of the Interstate Commerce Act, a copy of which said so-called application is marked Exhibit "C" and made a part of these findings.

That on or about the 11th day of February, 1911, the defendants filed with the Interstate Commerce Commission an application in writing requesting that said Commission authorize and permit said defendants to charge rates upon potatoes and other commodities between the cities of San Francisco, Oakland, San Jose, Stockton, Marysville and Los Angeles, and other points in the State of California, and the town of Pasco, in the State of Washington, lower than the rates from said California points to points on the Northern Pacific Railway Company intermediate to said town of Pasco, Washington; that a copy of said application is annexed to and made a part of these findings and marked Exhibit "D."

That on or about February 3d, 1914, the Interstate Commerce Commission made and entered an order denominated, "Fourth Section Order No. 3700"; that the copy of said order, marked Exhibit

“A,” and attached to the amendment to the answer of the defendants, is a true copy of said order, except that before the part of the said order set forth in said Exhibit “A,” the following occurs, viz.: “In the matter of permitting ordinary changes in rates pending action upon applications for relief from the provisions of the Fourth Section of the Act to Regulate Commerce as amended June 18, 1910.”

That the station of Kennewick is situated upon the line of defendant Northern Pacific Railway Company, in the State of Washington, three miles west of said station of Pasco and is also intermediate to said California points named in the complaint, [217] and said station of Pasco. That on or about the 17th day of May, 1911, the rates on potatoes from Pasco to said California points herein named were extended by said defendants to said station of Kennewick, and ever since that time said rates from Kennewick to said California destinations have been the same as the rates from Pasco to said destinations; that said station of Pasco is on the east side and said station of Kennewick is on the west side of the Columbia River.

That said application above referred to, which was filed with the Interstate Commerce Commission on or about the 11th day of February, 1911, has never been cancelled or withdrawn, and the same has never been granted or refused or acted upon, either wholly or in part, by the Interstate Commerce Commission; that said Fourth Section



Order No. 3700 has never been vacated, modified or set aside in whole or in part, except that Section 3 thereof has been eliminated.

V.

That the allegations of the alleged fourth separate defense pleaded in the answer of the defendants are true and are sustained by the evidence.

VI.

That plaintiff and his assignors have been damaged by the payment of the freight charges mentioned in the complaint; that with the exception of the cause of action which is barred as found in finding of fact, No. VII, the plaintiff and his assignors has been damaged by the amount of the overcharges as hereinabove found, plus the interest on each overcharge at the rate of seven per cent (7%) per annum, from the date of the payment thereof to the date of judgment herein.

VII.

That the cause of action based on the shipment first described in the schedule contained in subdivision V of the first cause of action stated in the complaint is barred by the provisions of section 16 of the Interstate Commerce Act.

VIII.

That the reasonable sum to be allowed plaintiff as and [218] for attorney's and counsel fees herein is the sum of Eleven Hundred Dollars (\$1100.00), which said sum is hereby taxed as part of the costs of the case.

XI.

That the amount in controversy in this suit ex-



ceeds, exclusive of interest and costs, the sum or value of \$3000.00 and is between citizens of different states, to wit, between the plaintiff a citizen and resident of the State of California and the defendants who are citizens and residents of the States of Minnesota and Kentucky.

### CONCLUSIONS OF LAW.

As conclusions of law from the foregoing findings of fact the Court finds:

#### I.

That plaintiff is entitled to judgment against defendants for the sum of Seven Thousand One Hundred Ninety-eight Dollars and Ninety-five Cents (\$7198.95), being the total amount of the overcharges collected by defendants, except the overcharge the cause of action to recover which is barred by limitation as found in finding VII, together with interest on each separate overcharge at the rate of seven per cent per annum from the date of the payment thereof, as alleged in the complaint, to the date of judgment; that the total amount of said interest to the 1st day of July, 1923, is the sum of Eight Hundred Seventeen Dollars and Forty-five Cents (\$817.45); that the interest on said overcharge amounts to the sum of One Dollar and Thirty-nine Cents (\$1.39) per day.

#### II.

That plaintiff is entitled to judgment for the sum of Eleven Hundred (\$1100.00) Dollars as attorney's and counsel fees herein, which said sum shall be taxed as part of the costs of the case.

III.

That plaintiff is entitled to judgment for his costs of suit. [219]

Let judgment be entered accordingly.

Dated this 8 day of Aug., 1923.

BOURQUIN,  
District Judge.

If amendment of the relief prayed (amount) does not conform to body of complaint, it is deemed amended to that end.

BOURQUIN,  
J. [220]

**Exhibit "A."**

INTERSTATE COMMERCE COMMISSION.  
ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of October, A. D. 1910. Present: MARTIN A. KNAPP, JUDSON C. CLEMENTS, CHARLES A. PROUTY, FRANCIS M. COCKRELL, FRANKLIN K. LANE, EDGAR E. CLARK, JAMES S. HARLAN, Commissioners.

IN THE MATTER OF APPLICATION FOR RELIEF UNDER THE FOURTH SECTION OF THE ACT TO REGULATE COMMERCE as AMENDED June 18, 1910.

A public hearing having been had, and it appearing that changes in rates and fares occurring in the ordinary course of business should be possible, pending the time when formal applications

to be relieved from the requirements of section 4 of the act to regulate commerce are to be filed by the carrier subject to that act:

IT IS ORDERED: That until February 17, 1911, said carriers may file with the Commission, in manner and form as prescribed by law and by the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points, and through rates or fares higher than the combinations of the intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not made greater than that in existence on August 17, 1910, except when a longer line or route reduces rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the short line. The Commission does not hereby approve any rates or fares that may be filed under this permission. All such rates and fares being subject to complaint, investigation, and correction if they conflict [221] with any other provisions of the act.

IT IS FURTHER ORDERED, that such of said carriers as desire to be relieved from any of the requirements of Section 4 of the Act shall, on or before February 17, 1911, file with the Commission applications as provided in said section 4 and in form as hereinafter prescribed.

Separate applications shall be made as to freight rates and passenger fares. Separate applications

shall also be made for relief under the long-and-short-haul provision and for relief under the prohibition against through rates or fares in excess of the combination of the intermediate rates or fares.

Separate applications should also be made for different situations governed by different rate adjustments or competitive influences.

Such applications must be certified, and where the relief sought is the same for two or more carriers in the same territory as to the same traffic application may be made jointly for two or more carriers by a joint agent or attorney, where the rates are contained in a joint tariff a petition from the carrier that issues the tariff, specifying the tariff by I. C. C. number, may be made on behalf of the carriers lawfully parties to the tariff and will be held and considered to be on behalf of all carriers concurring in the tariff.

Application for relief must be made on part of that carrier which actually charges more for the shorter haul than for the longer distance. For example, through rates from C. F. A. territory to the southeast made in combination on the Ohio River crossings. If the roads north of the river do not charge less for a longer distance haul to the river and the roads south of the river do charge more for a shorter haul, the application should be made on behalf of the roads south of the river.

If a joint rate or fare is reasonably less than the combination of the intermediate rates or fares, the carriers accepting divisions of such joint rate or

fare will not [222] ordinarily be held to thereby violate the fourth section of the act.

IT IS FURTHER ORDERED, that the Commission reaffirm its previously expressed view that a through rate or fare that is higher than the combination of the intermediate rates or fares is *prima facie* unreasonable (Rule 56 (b) Tariff Circular 17-A) and will insist upon the application of that principle at the earliest possible date in every instance except possible extreme and very unusual cases.

IT IS FURTHER ORDERED. That applications for relief from the provisions of the fourth section of the act shall be in such of the following forms as meet the conditions as to which such relief is sought:

(a) The — (name of carrier) —, through — (name of officer or agent making application), its — (official title) —, petitions the Interstate Commerce Commission for authority to establish rates for the transportation of — (name of commodity or description of traffic) — from — (name or description of point or points of origin) to — (name or description of point or points of destination) — lower than rates concurrently in effect to intermediate points — (names or description of intermediate points) —; the highest charge of such intermediate points to apply at — (name of intermediate point) —, and to be not more than — (cents per hundred pounds, per ton, per car, or per package) — in excess of the rates to — (name of more distant point at which lower



rate is proposed) —. This application is based upon the desire of petitioner to meet by direct haul over a longer line or route competitive conditions created at — (name or description of more distant point or points at which lower rates are proposed) — by — (name of railway) —.

NOTE: The points from and to which the lower rates are desired should be stated specifically [223] whenever practicable. If the applications applied to a situation in which rates or fares from or to a large number of points are based upon, or bear a fixed relation to, the rate or fare from a basing point to the destination in question, it will be sufficient to so state and to give the highest charge proposed from that basing point and the point at which highest charge will apply. If application refers to a particular commodity as to which it is desired to establish commodity rates from points of production or ports of transshipment, leaving higher class rates to apply from intermediate points, that fact should be stated and the producing points or ports should be named. When it is not practicable to name all the points of origin, or destination, and they can be accurately described by well-established and familiar names of traffic territories, such descriptions may be used; for example, "From Atlantic seaboard territory as described in — tariff. I. C. C. No. —" or "From C. F. A. territory."

(b) Same form as (a) shall be used except that the reason which is relied upon as justifying the application shall be stated to be desired to meet by direct haul lower rates fixed at the more distant point by competition of water carriers, specifying whether the competition is created by regular line or so-called "tramp" vessels, and if the former, the name of the line or lines.

(c) Application shall be made in the same form as (a), except that the reason relied upon in support of same shall be stated to be a desire to meet competition at the more distant point created by water carriers or shorter-line railroad, and to base the rates at intermediate points upon the rate to the more distant competitive point plus a local or charge back. The application shall also show whether the charge for the back haul is the full local or a proportional or an arbitrary rate.

(d) Application shall be made in general form the same as (a), [224] but shall request authority to charge a higher rate as the through route than the aggregate of the intermediate rates subject to the provisions of the act. Application shall state clearly the reasons in support thereof, and shall specify the extent to which it is desired to make the through rate higher than the aggregate of the intermediate rates.

The same forms, modified as may be necessary, shall be used for applications relative to passenger fares, whenever it is practicable the application, either as to the freight rates or passenger fares, should cite by I. C. C. numbers the tariff or tariffs

in which appear the rates, continuance of which is desired, whenever, it is practicable to confine the application to definite points of origin and destination, or to one or more named commodities, that should be done, and whenever practicable the rates themselves should be stated. Each carrier may file as many applications as are necessary to properly present the several situations as to which it desires relief, and it is desirable that each particular situation be treated by itself.

A true copy:

(Signed) EDW. A. MOSELEY,  
Secretary. [225]

**Exhibit "B."**

PACIFIC FREIGHT TARIFF BUREAU.

San Francisco, Cal.

December 10, 1910.

To the Interstate Commerce Commission,  
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF PACIFIC FREIGHT TARIFF BUREAU JOINT AND PROPORTIONAL FREIGHT TARIFF NO. 1, I. C. C. NO. 2 OF F. W. GOMPH, AGENT, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

In the name and on behalf of each of the carriers parties to the Tariff named above, the undersigned,

acting as Agent and Attorney, or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates shown in above named Tariff, from and to points named, LOWER than rates concurrently in effect to intermediate points through which traffic moves, in Canada, and in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington, and points in states east thereof, including District of Columbia.

This application is based upon the desire of the interested carriers to continue the present method, basis or principle of making rates lower at the more distant points than at the intermediate points; such lower rates being necessary by reason of—Competition of various water carriers operating upon the Atlantic and Pacific Oceans; Competition of carriers operating on the Atlantic and Pacific Oceans, partly by water and partly by rail; Competition of various water carriers operating coastwise on the Pacific Ocean; and of carriers partly by water (operating coastwise on the Pacific Ocean and upon the rivers of California and Oregon) and partly by rail between Pacific Coast ports and points in the interior; Rates established via the shorter or more direct routes, and applied via the longer or more circuitous route or routes; Competition between carriers [226] or routes subject to the Act to Regulate Commerce; Competition between markets of production and distribution.

A further petition is respectfully made asking for authority to waive that portion of the Fourth Section of the Amended Act, which provides that the through rate shall not exceed the aggregate of the intermediate rates subject to the provisions of the Act, or to permit your petitioner to publish in each of its Tariffs a clause as follows:

The aggregate of the local rates (class or commodity) to and from any intermediate point, when less than the through rates (class or commodity) shown in this Tariff, will apply as the through rate.

OR

The charges collected for the transportation of a shipment from and to, or between, points named in this Tariff and thereby made a part of this Tariff, **MUST NOT EXCEED** what the charges would be by applying thereon the aggregate of the lawful intermediate rates in force via the route over which the shipment moved.

LINE OF A GIVEN RAILROAD, there will be found instances where the aggregate of the intermediate rates will be less than the through rates in that Tariff. This condition is almost unavoidable because different bases are used upon different portions of the same line.

F. W. GOMPH,  
Agent.

Subscribed and sworn to before me this tenth (10) day of December, 1910.

PEDRO SAIZ,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires May 26, 1914. [227]



**Exhibit "C."**

PACIFIC FREIGHT TARIFF BUREAU.

San Francisco, Cal.

December 10, 1910.

To the Interstate Commerce Commission,  
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF PACIFIC FREIGHT TARIFF BUREAU AND PROPORTIONAL FREIGHT TARIFF NUMBER 1-A, I. C. C. NO. 62 OF F. W. GOMPH, AGENT, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION.

In the name and on behalf of each of the carriers that are parties to the above-named tariff the undersigned as agent and attorney or under authority of concurrences on file with the Commission from each of said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates shown in the above-named tariffs between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles and other points in California named in said tariff *and* Spokane, Walla Walla, Washington, Pendleton and Baker City, Oregon, and Warden, Osborne, Mullen, Idaho, and other points in Oregon, Washington and Idaho named in said tariff lower than the rates concur-

rently in effect at intermediate points on the Northern Pacific Railway.

This application is based on the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route, competitive conditions created at Bunn, Burke, Dorn, Gem, Hecla, Larson, Mine, Mullen, Wall and Warden, Idaho, by the Oregon-Washington Railway and Navigation Co. met by the Northern Pacific via Paradise and St. Regis, Montana, the longer and more circuitous route, but not applicable at Intermediate points along that line between Wausser and Larson, Idaho, for the reason that short line competition does not exist at such intermediate points.

It is not practical to state in this petition the [228] rates in detail nor specify the higher charge at intermediate points nor the extent to which rates at the intermediate points exceed the rates at the more distant points named.

F. W. GOMPH,  
Agent.

Subscribed and sworn to before me this 10th day of December, 1910.

P. SAIZ,  
Notary Public in and for the City and County of  
San Francisco, State of California. [229]

Exhibit "D."

PACIFIC FREIGHT TARIFF BUREAU.

San Francisco, Cal.

February 11, 1911.

PETITION No. 2.

To the Interstate Commerce Commission,  
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF TARIFF No. 1-A, I. C. C. No. 62 of F. W. GOMPH, Agent.

In the name and on behalf of each of the carriers parties to the Tariff above named, the undersigned, acting as Agent and Attorney or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates in above-named Tariff, between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles, Cal., and other points in California named in said tariff, *and* Pasco, Wash., lower than the rates to the points on the Northern Pacific Railway, intermediate to Pasco, Wash.

This application is based upon the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route competitive conditions created at points directly competitive with Pasco,

Wash., such as Wallula and Hunts Junction, Wash., by the Oregon-Washington Railroad and Navigation Co.

It is not practicable in this petition to state the rates in detail nor to specify the highest charges at intermediate point, nor the extent to which rates at the intermediate points exceed the rates at the more distant points named above.

F. W. GOMPH,  
Agent.

Subscribed and sworn to before me this 11th day of February, 1911.

P. SAIZ,  
Notary Public in and for the City and County of  
San Francisco, California.

Service and receipt of a copy of the within Findings of Fact is hereby admitted this 30th day of June, 1923.

ELMER WESTLAKE,  
J. E. LYONS,  
Attorneys for Defendants.

[Endorsed]: Filed August 14, 1923. Walter B. Maling, Clerk. [230]

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(Title of Court and Cause—No. 16746.)

### **Judgment on Findings.**

This cause having come on regularly for trial upon the 14th day of March, 1923, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed; A. J. Harwood, Esq., appearing as attorney for plain-

tiff and Frank B. Austin and Elmer Westlake, Esqrs., appearing as attorneys for defendants and the trial having been proceeded with on the 15th day of March, 1923, and oral and documentary evidence having been introduced on behalf of the respective parties and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation having filed its opinion and its findings in writing and ordered that judgment be entered herein in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that A. W. Knox, plaintiff, do have and recover of and from Northern Pacific Railway Company, a corporation, and Southern Pacific Company a corporation; defendants, the sum of Eight Thousand Seventy-eight and 95/100 (\$8,078.95) Dollars, together with \$1100.00 as attorney's fees and for costs herein expended taxed at \$——.

Judgment entered August 14, 1923.

WALTER B. MALING,  
Clerk. [231]

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(Title of Court and Cause—No. 16746.)

**Stipulation and Order Extending Time to and Including September 27, 1923, to File Bill of Exceptions.**

It is hereby stipulated that the defendants have until and including September 27th, 1923, in which to prepare and serve on the plaintiffs a draft of the



proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,  
Attorney for Plaintiff.  
HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAS. E. LYONS,  
Attorneys for Defendants.

So ordered.

PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Sep. 18, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[232]

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(Title of Court and Cause—No. 16746.)

**Stipulation and Order Extending Time to and Including October 15, 1923, to File Bill of Exceptions.**

It is hereby stipulated that the defendants have until and including October 15th, 1923, in which to prepare and serve on the plaintiff a draft of the proposed bill of exceptions in the above-entitled action.

ALFRED J. HARWOOD,  
Attorney for Plaintiff.  
HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,  
Attorneys for Defendants.

So ordered.

PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Sep. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[233]

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(Title of Court and Cause—No. 16746.)

**Stipulation and Order Extending Time to and Including October 25, 1923, to File Bill of Exceptions.**

It is stipulated that the defendants have until and including October 25, 1923, in which to prepare and serve on the plaintiff a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,  
Attorney for Plaintiff.  
HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAS. E. LYONS,  
Attorneys for Defendants.

So ordered.

PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Oct. 11, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[234]

(Title of Court and Cause—No. 16746.)

**Stipulation and Order Extending Time to and Including November 10, 1923, to File Bill of Exceptions.**

It is stipulated that the defendants have until and including November 10, 1923, in which to prepare and serve on the plaintiff a draft of the proposed bill of exceptions in the above-entitled action.

A. J. HARWOOD,  
Attorney for Plaintiff.  
HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAS. E. LYONS,  
Attorneys for Defendants.

So ordered.

PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Oct. 24, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[235]

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(Title of Court and Cause—No. 16746.)

**Petition for Writ of Error.**

To the Honorable JOHN S. PARTRIDGE, Presiding Judge of the Above-entitled Court, and to the Judge or Judges of said District Court:

Now come the above-named defendants, Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, by Hen-

ley C. Booth, Elmer Westlake and James E. Lyons, their attorneys, and say:

That on the 14th day of August, 1923, this Court entered a judgment herein, in favor of plaintiff and against defendants, in which judgment and proceedings prior thereunto in this cause certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors, which is filed with this petition;

WHEREFORE, defendants pray that a writ of error may issue in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the United States [236] Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, Cal., this 14th day of December, 1923.

HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAS. E. LYONS,  
Attorneys for Defendants.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[237]

(Title of Court and Cause—No. 16746.)

### **Assignment of Errors.**

Now come the Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the defendants in the above numbered and entitled cause, and in connection with their petition for a writ of error herein, assign the following errors, which they aver were committed by the Court upon the trial of this case and in the rendition of the judgment against the said defendants, appearing upon the record herein, to wit:

(1) The Court erred in overruling and in not sustaining the defendants' demurrer to the original complaint filed in this cause, and in holding that plaintiff was not bound to first seek relief from the Interstate Commerce Commission before applying to the District Court.

(2) The Court erred in overruling the defendants' motion for a nonsuit.

(3) The Court erred in holding and finding that plaintiff "is entitled to recover the difference between said alleged overcharge and the charge then made by defendant, Northern Pacific Railway Company, for the haul from said stations respectively to said main line; that the amount of the overcharge on shipments from [238] said stations is as follows: In shipment from Ashue in Car Number CNJ 9180, the amount of the overcharge was and is the sum of \$49.80 instead of the sum of \$74.49 as stated in the complaint. In the case of the shipment from Ashue in Car Number RI 66069,



the amount of the overcharge was and is the sum of \$57.04 instead of the sum of \$85.56 as stated in the complaint. In the shipment from Harrah in Car Number NP 98678, the amount of the overcharge was and is the sum of \$71.23 instead of the sum of \$92.77 as stated in the complaint. In the shipment from Cowich in Car Number NP 96854 the amount of the overcharge was and is the sum of \$46.37 instead of the sum of \$70.25 as stated in the complaint. In the shipment from Ashue in Car Number B&O 13657, the amount of the overcharge was and is the sum of \$53.62 instead of the sum of \$80.43 as stated in the complaint. In the shipment from Ashue in Car Number CBQ 38539 the amount of the overcharge was and is the sum of \$52.52 instead of the sum of \$78.78 as stated in the complaint. In the shipment from Ashue in Car Number NYC 152247 the amount of the overcharge was and is the sum of \$54.26 instead of the sum of \$81.37 as stated in the complaint. That in the shipment from Ashue in Car Number CSTPM 8620, the amount of the overcharge was and is the sum of \$53.40 instead of the sum of \$80.10 as stated in the complaint.”

(4) The Court erred in holding and finding that for all practical rate-making purposes the stations of Harrah, Ashue and Cowiche are intermediate between Kennewick and Portland, and also between Kennewick and the stations of delivery.

(5) The Court erred in holding and finding: “That plaintiff and his assignors have been damaged by the payment of the freight charges mentioned in the complaint; that with the exception

of the cause of action which is barred as found in Finding of Fact No. VII, the plaintiff and his assignors has been damaged by the amount of the overcharges as hereinabove found, plus the interest on each overcharge at the rate of seven per cent (7%) per annum, from the date of [239] the payment thereof to the date of judgment therein."

(6) The Court erred in holding and deciding that: "Whether or not defendants' application to be relieved from Section 4 was in proper form and time, it affords no protection in respect to the violations of Section 4 involved in the charges herein. These violations were by reason of rates initiated subsequent to the amendment of 1910, and so not within the latter's continuance of rates 'lawfully existing at the time of the passage of this Act' until applications made to continue them were by the Commission determined. They were only within that provision of Section 4 which provided that application for relief could be made and granted 'in special cases after investigation.' That is, rates to be thus granted or authorized, but which could not be legally charged until thus granted or authorized."

(7) The Court erred in holding and deciding that the defendants application to be relieved from the provisions of the 4th Section of the Interstate Commerce Act introduced in evidence herein afforded no protection in respect to the alleged violations of Section 4 of said act, involved in the complaint herein.

(8) The Court erred in holding and deciding

that the 4th Section Orders of the Interstate Commerce Commission introduced in evidence herein, were made without authority and are void in as far as they authorize the alleged departures from the provisions of the 4th Section of the Interstate Commerce Act, complained of in this action.

(9) The Court erred in finding and holding that plaintiffs are entitled to judgment for the sum of Eleven Hundred (\$1100.00) Dollars, or any other sum, as attorney's and counsel fees herein.

(10) The Court erred in holding and deciding that the separate defenses pleaded in the defendants' answer to the complaint and the amendments thereto and in the amendments made to conform to the proofs do not constitute a full and complete defense to this action. [240]

(11) The Court erred in not rendering judgment on its findings in favor of defendants and against the plaintiff.

WHEREFORE, the said defendants pray that the judgment of the District Court may be reversed.

Dated: San Francisco, Cal., this 14th day of December, 1923.

HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAS. E. LYONS,  
Attorneys for Defendants.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[241]

(Title of Court and Cause—No. 16746.)

**Order Allowing Writ of Error.**

On this 2d day of January, 1924, came the above-named Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the defendants herein, by Henley C. Booth, Elmer Westlake and James E. Lyons, their attorneys, and filed herein and presented to this Court, their petition praying for the allowance of a writ of error and the assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises;

And the said parties having filed herein a stipulation in writing waiving bond for costs and a supersedeas bond,

On consideration whereof, this Court does hereby allow the writ of error and orders that said writ of error issue without requiring the filing of any bond.

Dated: San Francisco, Cal., this 2d day of January, 1924.

FRANK H. RUDKIN,  
United States Circuit Judge.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[242]

(Title of Court and Cause—No. 16746.)

**Stipulation and Order Waiving Bonds on Allowance of Writ of Error.**

IT IS HEREBY STIPULATED that a writ of error may be allowed and granted upon defendants' petition therefor without the filing of any supersedeas bond or bond for costs, and that supersedeas and costs bond is hereby waived.

Dated: San Francisco, Cal., this 14th day of December, 1923.

ALFRED J. HARWOOD,  
Attorney for Plaintiff.  
HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,  
Attorneys for Defendants.

So ordered.

FRANK H. RUDKIN,  
United States Circuit Judge.

[Endorsed]: Filed Jan. 2, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[243]

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(Title of Court and Cause—No. 16746.)

**Praeceptum for Transcript of Record.**

To the Honorable WALTER B. MALING, Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court



of Appeals for the Ninth Circuit, pursuant to a writ of error allowed in the above-entitled cause, and to include in such transcript the following papers, to wit:

1. Complaint.
2. Answer of defendants.
3. Trial stipulation, filed March 12, 1923.
4. Minute order, March 12, 1923, allowing amendment to answer.
5. Amendment to answer.
6. Minute order, March 12, 1923, denying defendants' motion for nonsuit.
7. Findings of fact and conclusions of law.
8. Judgment order.
9. All stipulations and orders extending time to serve and tender defendants' bill of exceptions.
10. Stipulation and order waiving bonds on allowance of writ of error. [244]
11. Petition for writ of error.
12. Assignment of errors.
13. Order allowing writ of error.
14. Writ of error.
15. Citation on writ of error.
16. This praecipe.
17. Clerk's certificate to transcript.

Please consolidate the transcript in this case with that in suit No. 16,741, entitled *A. Levy & J. Zentner Company, a Corporation, Plaintiff, v. Northern Pacific Railway Company, et al., Defendants.*

Dated: At San Francisco, California, this 3d day of January, 1924.

HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,

Attorneys for Defendants.

[Endorsed]: Filed Jan. 14, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [245]

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(Title of Court and Cause—No. 16746, No. 16694,  
No. 16741.)

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing two hundred and forty-five (245) pages, numbered from 1 to 245, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled causes, in the office of the clerk of said Court, and that the same constitute the return to the annexed writs of error.

I further certify that the cost of the foregoing return to writs of error is \$160.75; that said amount was paid by the defendants, and that the original writs of error and citations issued in said causes are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 13th day of February, A. D. 1924.

[Seal]                      WALTER B. MALING,  
Clerk of the United States District Court for the  
Northern District of California. [245½]

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(Title of Court and Cause—No. 16741.)

**Writ of Error.**

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judge or Judges of the Southern Division of the District Court of the United States for the Northern District of California, Second Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment and plea which is in the said District Court before you, at the March, 1923, term thereof, wherein Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are plaintiffs in error, and A. Levy & J. Zentner Company, a corporation, is defendant in error, and wherein said A. Levy and J. Zentner Company, a corporation, was plaintiff and said Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, were defendants, a manifest error has happened to the damage of the said Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, the plaintiffs in error as by their complaint appears:



Service of the within writ is hereby acknowledged this 3d day of January, 1924.

ALFRED J. HARWOOD,  
Atty. for Deft. in Error.

[Endorsed]: Filed Jan. 4, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [2471½]

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**Return to Writ of Error (No. 16741).**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,  
Clerk United States District Court, in and for the  
Northern District of California. [248]



(Title of Court and Cause—No. 16741.)

**Citation on Writ of Error.**

United States of America,

Northern District of California,—ss.

The President of the United States, to A. Levy and  
J. Zentner Company, a Corporation, GREET-  
ING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco in the State of California on the 1st day of February, 1924, being within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Southern Division of the United States District Court for the Northern District of California, Second Division, wherein Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [249]

WITNESS the Honorable FRANK H. RUDKIN, United States Circuit Judge for the Ninth Circuit, this 2d day of January, 1924.

FRANK H. RUDKIN,  
United States Circuit Judge. [250]

Service of the within citation is admitted this 3d day of Jan., 1924.

ALFRED J. HARWOOD,  
Attorney for Deft. in Error.

[Endorsed]: Filed Jan. 4, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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(Title of Court and Cause—No. 16694.)

**Writ of Error.**

United States of America,—ss.

The President of the United States of America,  
to the Honorable, the Judge or Judges of the  
Southern Division of the District Court of the  
United States for the Northern District of  
California, Second Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment and plea which is in the said District Court before you, at the March, 1923, Term thereof, wherein Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are plaintiffs in error, and Joseph Moyses and A. P. Jacobs, copartners doing business under the firm name and style of Jacobs, Malcolm & Burtt are defendants in error, and wherein said Joseph Moyses and A. P. Jacobs, copartners doing business under the firm name and style of Jacobs, Malcolm & Burtt were plaintiffs and said Northern Pacific Railway Company, a corporation, and Southern Pacific Company,



Allowed by:

FRANK H. RUDKIN,  
United States Circuit Judge. [252]

Service of the within writ is hereby acknowledged  
this 3d day of January, 1924.

ALFRED J. HARWOOD,  
Attorney for Deft. in Error.

[Endorsed]: Filed Jan. 4, 1924. Walter B. Mal-  
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.

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**Return to Writ of Error (No. 16694).**

The answer of the Judge of the District Court  
of the United States, in and for the Northern  
District of California, Second Division.

The record and all proceedings of the plaint  
whereof mention is within made, with all things  
touching the same, we certify under the seal of  
our said Court, to the United States Circuit Court  
of Appeals for the Ninth Circuit, within mentioned,  
at the day and place within contained, in a certain  
schedule to this writ annexed as within we are  
commanded.

By the Court.

WALTER B. MALING,  
Clerk United States District Court, in and for the  
Northern District of California. [253]

(Title of Court and Cause—No. 16694.)

**Citation on Writ of Error.**

United States of America,  
Northern District of California,—ss.

The President of the United States of America,  
to Joseph Moyse and A. P. Jacobs, Copartners  
Doing Business Under the Firm Name and  
Style of Jacobs, Malcolm & Burtt, GREET-  
ING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 1st day of February, 1924, being within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Southern Division of the United States District Court for the Northern District of California, Second Division, wherein Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, plaintiffs in error, as in the said writ of error mentioned, should not be corrected, [254] and why speedy justice should not be done to the parties in that behalf.



WITNESS the Honorable FRANK H. RUDKIN, United States Circuit Judge for the Ninth Circuit, this 2d day of January, 1924.

FRANK H. RUDKIN,  
United States Circuit Judge. [255]

Service of the within citation is admitted this 3d day of Jan. 1924.

ALFRED J. HARWOOD,  
Attorney for Deft. in Error.

[Endorsed]: Filed Jan. 4, 1924. Walter B. Mal-  
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.

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(Title of Court and Cause—No. 16746.)

**Writ of Error.**

United States of America,—ss.

The President of the United States of America,  
to the Honorable, the Judge or Judges of the  
Southern Division of the District Court of the  
United States for the Northern District of  
California, Second Division, GREETING:

Because, in the record and proceedings, as also  
in the rendition of the judgment and plea which  
is in the said District Court before you, at the  
March, 1923, Term thereof, wherein Northern Pa-  
cific Railway Company, a corporation, and Southern  
Pacific Company, a corporation, are plaintiffs in  
error, and A. W. Knox is defendant in error, and  
wherein said A. W. Knox was plaintiff and said  
Northern Pacific Railway Company, a corporation,  
and Southern Pacific Company, a corporation, were



Allowed by.

FRANK H. RUDKIN,  
United States Circuit Judge. [257]

Service of the within writ is hereby acknowledged  
this 3d day of January, 1924.

ALFRED J. HARWOOD,  
Attorney for Deft. in Error.

[Endorsed]: Filed Jan. 4, 1924. Walter B. Mal-  
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.

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**Return to Writ of Error (No. 16746).**

The answer of the Judge of the District Court  
of the United States, in and for the Northern Dis-  
trict of California, Second Division.

The record and all proceedings of the plaint  
whereof mention is within made, with all things  
touching the same, we certify under the seal of our  
said Court, to the United States Circuit Court of  
Appeals for the Ninth Circuit, within mentioned,  
at the day and place within contained, in a certain  
schedule to this writ annexed as within we are  
commanded.

By the Court.

[Seal] WALTER B. MALING,  
Clerk United States District Court, in and for the  
Northern District of California. [258]

(Title of Court and Cause—No. 16746.)

**Citation on Writ of Error.**

United States of America,

Northern District of California,—ss.

The President of the United States of America,  
to A. W. Knox, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 1st day of February, 1924, being within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Southern Division of the United States District Court for the Northern District of California, Second Division, wherein Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are plaintiffs in error, and you are defendant in error, to show cause if any there be, why the judgment rendered against the said Northern Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [259]

WITNESS the Honorable FRANK H. RUDKIN, United States Circuit Judge for the Ninth Circuit, this 2d day of January, 1924.

FRANK H. RUDKIN,  
United States Circuit Judge. [260]

Service of the within citation is admitted this 3d day of Jan. 1924.

ALFRED J. HARWOOD,  
Attorney for Deft. in Error.

[Endorsed]: Filed Jan. 4, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed]: No. 4201. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Plaintiffs in Error, vs. A. Levy and J. Zentner Company, a Corporation, Defendant in Error, and Northern Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Plaintiffs in Error, vs. A. W. Knox, Defendant in Error, and Northern Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Plaintiffs in Error, vs. Joseph Moyses and A. P. Jacobs, Copartners, Doing Business Under the Firm Name and Style of Jacobs, Malcolm & Burtt, Defendants in Error. Transcript of Record. Upon Writs of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division. Filed February 23, 1924.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



In the United States Circuit Court of Appeals for  
the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation, and SOUTHERN PACIFIC  
COMPANY, a Corporation,

Plaintiffs in Error,

vs.

A. LEVY & J. ZENTNER COMPANY, a Corpora-  
tion,

Defendant in Error.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation, and SOUTHERN PACIFIC  
COMPANY, a Corporation,

Plaintiffs in Error,

vs.

A. W. KNOX,

Defendant in Error.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation, and SOUTHERN PACIFIC  
COMPANY, a Corporation,

Plaintiffs in Error,

vs.

JOSEPH MOYSE and A. P. JACOBS, Copartners  
Doing Business Under the Firm Name and  
Style of JACOBS, MALCOLM & BURTT,

Defendants in Error.

**Stipulation and Order Relative to Consolidation of  
Records and Briefs.**

It is hereby stipulated that the records in the

several causes above-entitled may be consolidated into a single transcript in the court below, for use of the above-entitled court; that but one copy of the consolidated bill of exceptions need be incorporated in said consolidated transcript and may be used as the bill of exceptions in each case; and that only one set of briefs need be filed by the attorneys of record herein, covering all three cases.

Dated: At San Francisco, California, this 14th day of January, 1924.

HENLEY C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,

Attorneys for Plaintiffs in Error in Each of said Cases.

ALFRED J. HARWOOD,  
Attorneys for Defendants in Error in Each of said Cases.

So ordered.

HUNT,  
United States Circuit Judge.

[Endorsed]: No. 4201. (Three Cases Consolidated.) In the United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, and Southern Pacific Company, a Corporation, Plaintiffs in Error, vs. A. Levy & J. Zentner Company, a Corporation, Defendants in Error. Northern Pacific Railway Company et al., Plaintiffs in Error, vs. A. W. Knox, Defendant in Error. Northern Pacific Railway Company et al., Plaintiffs in Error, vs. Joseph Moyse et al., Defendants in Error. Stipulation and

Order Relative Consolidation of Records and Briefs.  
Filed Feb. 23, 1924. F. D. Monekton, Clerk.

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In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. 4201.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation, et al.,  
Plaintiffs in Error,

vs.

A. LEVY & J. ZENTNER COMPANY, a Corpora-  
tion, et al.,  
Defendants in Error.

**Stipulation and Order Re Printing Transcript.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the parties hereto, by their respec-  
tive attorneys of record, that in printing the tran-  
script of record on writs of error herein the caption,  
title, and clerk's endorsements of filing of plead-  
ings, papers, and other formal matters, and all of  
the exhibits attached to the bill of exceptions, shall  
be omitted, except that each pleading and docu-  
ment so printed shall be identified by the number  
in the court below of the action to which the same  
relates.

Dated this 8th day of March, 1924.

H. C. BOOTH,  
ELMER WESTLAKE,  
JAMES E. LYONS,

Attorneys for Plaintiffs in Error.

ALFRED J. HARWOOD,  
Attorney for Defendants in Error.

So ordered.

W. H. HUNT,  
United States Circuit Judge.

[Endorsed]: No. 4201. In the United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, et al., Plaintiffs in Error, vs. A. Levy & J. Zentner Company, a Corporation, et al., Defendants in Error. Stipulation and Order Re Printing Transcript. Filed Mar. 10, 1924. F. D. Monckton, Clerk.





